Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

LINDA DAGI,
Petitioner,

v.

CHRIS MOTORS CORPORATION,
BAYERISCHE MOTOREN WERKE, A.G.,
and BMW OF NORTH AMERICA, INC.,
Respondents.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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42 pp

QUESTIONS PRESENTED

The questions presented include:

1. Whether the Eleventh Circuit Court of Appeals erred in misconstruing and misapplying the decision in Caterpillar, Inc. v. Williams, 482 U.S. 386, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987), with respect to the case *sub judice*, since the initial Complaint was, in fact, a well-pleaded Complaint that contained all of the elements of a federal odometer fraud claim under 15 United States Code §1981, 1989) and erred in not reversing the District Court and directing that the case be remanded to the State Court of Fulton County, Georgia, pursuant to 28 United States Code §1447 (c), since Chris Motors Corporation's attempted removal sixteen moths after receipt of said initial Complaint was untimely, in that the case was not removed to the United States District Court within 30 days of the receipt of the initial Complaint stating a claim for federal odometer fraud, as required by the removal statute 28 United States Code §1446(b)?

2. Whether the Eleventh Circuit Court of Appeals erred in overlooking and not considering material facts in the record that establish that there are genuine issues of fact as to whether Defendant Chris Motors Corporation is liable for common law fraud and negligent misrepresentations recklessly made, in connection with odometer disconnection and tampering and false representations as to the actual mileage on the BMW automobile, erred in overlooking and not considering decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia [including Harris v. Mullins, 32 Ga. 704 (1861); Larey v. Taliaferro, 57 Ga. 443 (1876); City Dodge v. Garnder, 232 Ga. 766, 208 S.E. 2d 794 (1974); Bill Spreen Toyota, Inc. v. Jenquin, 163 Ga. App. 855, 294 S.E. 2d 533 (1982); Rivers v.

BMW of North America, Inc., 214 Ga. App. 880, 449 S.E. 2d 337 (1994); Harmon v. BMW of North America, Inc., Case No. A94A21003 in the Court of Appeals of Georgia, decided January 26, 1995 (a copy of said unreported decision is included in the Appendix; and Crown Ford, Inc. v. Crawford, 221 Ga. App. 881, 473 S.E. 2d 554 (1996), which cases hold that a plaintiff can make an election to sue for common law fraud and negligent misrepresentations recklessly made, without rescinding a contract to purchase a vehicle, and holding that such actions for fraud and negligent misrepresentation are not barred by a merger clause contained in the sales contract and are not barred by an "as is" clause contained in a disclaimer of warranties,] which decisions are binding precedents under Erie R. Co. v. Tompkins 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and erred in not reversing the District Court and denying Defendant Chris Motors Corporation's Motion for Summary Judgment, based upon the binding Georgia precedents, pursuant to Erie R. Co. v. Tompkins?

3. Whether the Eleventh Circuit Court of Appeals erred in overlooking and not considering material facts in the record that establish that there are genuine issues of material facts as to whether Plaintiff Linda Dagi is entitled to recover on her federal odometer fraud claim under 15 United States Code §§ 1981, 1989, erred in overlooking and not considering decisions of the old (pre-November 1, 1980) Fifth Circuit Court of Appeals and decisions of the Eleventh Circuit Court of Appeals [Nieto v. Pence, 578 F.2d 640 (5th Cir. 1978); and Huycke v. Greenway, 876 F.2d 94 (11th Cir. 1989), which hold that a Plaintiff need not show actual intent to defraud in a federal odometer fraud claim, but may establish a violation of the Federal Odometer Act, by relying on circumstantial evidence to show constructive knowledge that the actual miles on a vehicle are greater than the miles shown on the odometer and

greater than the miles shown on the federal odometer disclosure statement], which decisions are binding precedents under Bonner v. City of Pritchard, Alabama, 661 F.2d 1206 11th Cir. 1980, and the doctrine of *stare decisis* under Hilton v. South Carolina Public Railway Commission, 502 U.S. 197, 112 S.Ct. 560, 116 L. Ed. 2d 560 (1991) and the rule of binding precedent under Johnson v. DeSoto County Board of Commissioners, 72 F.3d 1556 (11th Cir. 1996).?

4. Whether the United States District Court violated cardinal rules regarding decisions on motions for summary judgment, when in its July 31, 1995 and November 30, 1995 orders granting the motions for summary judgment of Defendants Chris Motors Corporation, Bayerische Motoren Werke, A.G. and BMW of North America, Inc., Appendix pages 26a-44a and pages 68a-90a, the District Court weighed the evidence and made credibility findings, contrary to the controlling legal standards applicable to motions for summary judgment as stated in Clemons v. Dougherty County, Georgia, 684 F.2d 1294, 1297 (11th Cir. 1982); Warrior Tombigbee Transportation Company, Inc. v. M/V Nan Fung, 695 F.2d 1294, 1297 (11th Cir. 1983); Samples on Behalf of Samples v. City of Atlanta, 846 F.2d 1328 (11th Cir. 1988) and Big Apple BMW, v. BMW of North America, Inc., 974 F. 2d 1358 (3rd Cir. 1992) and the United States Court of Appeals for the Eleventh Circuit abdicated its duty to review, recognize and reverse the erroneous approach taken by the District Court in weighing this evidence and making credibility findings in deciding the motions for summary judgment of Chris Motors Corporation, Bayerische Motoren Werke, A.G., and BMW of North America, Inc.?

5. Whether the erroneous decisions of the United States Court of Appeals for the Eleventh Circuit was reached because the Court of Appeals arbitrarily denied Appellant Linda Dagi's request for oral argument and arbitrarily assigned the case to the Non-Argument Calendar, contrary to the Court of Appeals' policy to grant oral argument where important and complex issues are presented on appeal and in complete disregard of the writings of distinguished jurists, including United States Circuit Judge Myron S. Bright, United States Circuit Judge Richard S. Arnold, Mr. Chief Justice Hughes, Mr. Justice Harlan, Mr. Justice Jackson, and Mr. Justice Rehnquist?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit included:

Linda Dagi
Plaintiff/Appellant

Chris Motors Corporation
Defendant/Appellee

Bayerische Motoren Werke, A.G. (BMW AG)
Defendant/Appellee

BMW of North America, Inc. (BMW NA)
Defendant/Appellee

BMW NA is a wholly owned subsidiary of the parent company BMW AG. See Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F. 3d 745 (1st Cir. 1994) (Opinion by Chief Judge Breyer, who is now Mr. Justice Breyer).

These are no other parent companies or non-wholly owned subsidiaries that are required to be listed by Rule 29.6 of the Rules of the Supreme Court of the United States.

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On Petition For Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioner Linda Dagi respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit in Case Numbers 95-9501 and 96-8025.

OPINIONS BELOW

The November 21, 1996 Opinion and Judgment of the Eleventh Circuit Court of Appeals in Case numbers 95-9501 and 96-8025) is reproduced in the Appendix at 13a-15a and pages 16a-17a. The November 21, 1996 Opinion and

Judgment is not officially reported, and the decision appears in a list of decisions without reported opinions in 102 F.3d 535(1996), with a notation that the case should not be cited without attaching a copy of the Opinion and Judgement. The January 22, 1997 Order of the Eleventh Circuit panel denying Petitioner's combined petition for panel rehearing and suggestion for rehearing *en banc*, is unpublished, and is reproduced in the Appendix at pages 18a-19a.

The July 31, 1995 Order and November 2, 1995 Judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, entered by Judge Julie Carnes, granting Defendant Chris Motors Corporation's motion for summary judgment are unpublished and are reproduced in the Appendix at pages 26a-44a and page 63a.

The November 30, 1995 Order and December 1, 1995 Judgment of the United States District Court for the Northern District of Georgia, Atlanta Division entered by Judge Julie Carnes, granting Defendants Bayerische Motoren Werke, A.G. and BMW of North America, Inc.'s motion for summary judgment are unpublished and are reproduced in the Appendix at pages 68a-90a and 91a.

JURISDICTION

The Defendant Chris Motors Corporation claims that the United States District Court had jurisdiction of this case based upon a claim under the Federal Odometer Act, 15 United States Code §1981, 1989, which is a federal question under 28 United States Code §1331.

State courts have concurrent jurisdiction of federal odometer fraud claims under 15 United States Code §1989(b).

The United States Court of Appeals has jurisdiction of Case Number 95-9501 and 96-8025 under 28 United States Code §1291, which provides that the Courts of Appeals of the United States have jurisdiction of appeals from all final decisions of the District Courts of the United States.

The United States Supreme Court has jurisdiction to issue the Writ of Certiorari under 28 United States Code §1254 (1).

STATUTORY PROVISIONS INVOLVED

The statute pertaining to jurisdiction for writs of certiorari in the United States Supreme Court is 28 United States Code §1254, which provides in pertinent part, as follows:

28 United States Code §1254,
Court of Appeals; Certiorari; Certified Questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions ore require the entire record to be sent up for decision of the entire matter in controversy.

The statute pertaining to jurisdiction of federal questions in the United States District Courts is 28 United States Code §1331, which provides in pertinent part, as follows:

28 United States Code §1331.
Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Statutes pertaining to removal of cases from state courts to United States district Courts and remand of cases from United States District Court to state courts include 28 United States Code §1446 and §1447, which provide in pertinent part, as follows:

28 United States Code §1446.
Procedure for removal.

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such actions pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt of the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which

such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 United States Code §1447
procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued not such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. an order remanding the case may

require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

In 1972, Congress enacted the Motor Vehicle Informative and Cost Savings Act in Public Law 92-513, October 20, 1972, 86 statues 947, which was codified as 15 United States Code §1981 *et seq*. Provisions pertaining to odometer fraud were contained in Public Law 92-513, Title IV, §401 et seq., October 20, 1972, 86 statutes 961, which was codified as 15 United States Code §§1989 through 1991. Statutory provision pertinent to this case include:

15 United States Code §1981
Congressional findings and declaration of purpose

The congress hereby finds that purchasers, when buying motor vehicles, rely heavily on the odometer reading as an index of the condition and value of such vehicle; that purchasers are entitled to rely on the odometer reading as an accurate reflection of the mileage actually traveled by the

vehicle; that an accurate indication of the mileage traveled by a motor vehicle assists the purchaser in determining its safety and reliability; and that motor vehicles move in the current of interstate and foreign commerce or affect such commerce. It is therefore the purpose of this subchapter to prohibit tampering with odometers on motor vehicles and to establish certain safeguards for the protection of purchasers with respect to the sale of motor vehicles having altered or reset odometers.

15 United States Code §1982.
Definitions

As used in this subchapter-

(1) The term "dealer" means any person who has sold 5 or more motor vehicles in the past 12 months to purchasers who in good faith purchase such vehicles for purposes other than resale.-

(2) The term "distributor: means any person who has sold 5 or more vehicles in the past 12 months for resale.

(3) The term "odometer" means an instrument for measuring and recording the actual distance a motor vehicle travels while in operation; but shall not include any auxiliary odometer designed to be reset by the operator of the motor vehicle for the purpose of recording mileage on trips.

(4) The term "repair and replacement" means to restore to a sound working condition by replacing the odometer or any part hereof or ;by correcting what is inoperative.

(5) The term "transfer" means to change ownership by purchase, gift, or any other means.

15 United States Code §1983.
Devices causing odometer to register other than true mileage drive prohibited

No person shall advertise for sale, sell, use, or install or cause to be installed, any device which causes an odometer to register any mileage other than the true mileage driven. For purposes of this section, the true mileage driven is that mileage driven by the vehicle as registered by the odometer within the manufacturer's designed tolerance.

15 United States Code §1984.
Change of mileage indicated on odometer prohibited

No person shall disconnect, reset, or alter or cause to be disconnected, reset, or altered, the odometer of any motor vehicle with intent to change the number of miles indicated thereon.

15 United States Code §1985.
operation of Motor Vehicle with knowledge of disconnection or non-functional odometer prohibited

No person shall, with intent to defraud, operate a motor vehicle on any street or highway knowing that the odometer of such vehicle is disconnected or nonfunctional.

15 United States Code §1986
Conspiracy to violate odometer requirements

No person shall conspire with any other person to violate section 1983, 1984, 1985, 1987, or 1988 of this title.

* * *

15 United States Code §1989.
Civil actions to enforce liability for violations of odometer requirements; amount of damages; jurisdiction; period of limitations.

(a) Any person who, with intent to defraud, violates any requirement imposed under this subchapter shall be liable in an amount equal to the sum of -

(1) three times the amount of actual damages sustain or $1,500., whichever is greater; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney fees as determine by the court.

(b) An action to enforce any liability created under subsection (a) of this section, may be brought in a United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years from the date on which the liability arises.

NOTE: The Federal Odometer Act contained in Title IV of the Motor Vehicle Inforamtion and Cost Savings Act, 15 United States Code §§1981 - 1991 (1972) was repealed on July 5, 1994, by Public Law 103-292, §7b, 108 Statutes 1379, and was replaced by 49 United States Code §§32701 through 32710. Because the relevant activities occurred in 1992 before the old Act, 15 United States Code §§1981 - 1991 was repealed, the provisions of the old Act are applicable to this case. Roberts v. Robert v. Rohrman, Inc., 909 F. Supp. 545 (N.D. Ill. 1995)

STATEMENT OF THE CASE

This is an action in tort and fraud brought by Linda Dagi, Plaintiff/Appellant, against Defendants Bayerische Motoren Werke, A.G. (hereinafter referred to as "BMW AG"), BMW of North America, Inc. (hereinafter referred to as "BMW NA"), and Chris Motors Corporation (hereinafter referred to as "Chris Motors"). The case was originally filed on March 19, 1993, in the State Court of Fulton County as Case Number 93-VS-0070409-F. See Plaintiff's Complaint for Damages (R 1-1-5; Document #1)

On August 12, 1994, the Defendants removed this case to the United States District Court for the Northern District of Georgia, where it was docketed as Civil Action File No. 1:94-CV-2135-JEC. On Monday, September 12, 1994, Plaintiff filed a timely Motion to Remand. See Plaintiff's Motion to Remand, Brief in Support of Plaintiff's Motion to Remand, Affidavit Regarding Deposition of Neil Christman, Affidavit of Joyce Christman, and Notice of Motion to Remand Removed Action, all of which documents were filed in this Court on September 12, 1994 (R 3-5-1;) See also, Plaintiff's Reply Brief in Support of Plaintiff's Motion to Remand filed October 13, 1994 (R 4-9-1;) and the October 24, 1994 Order denying Plaintiff's Motion to Remand (R 4-10-1;).

The United States Court of Appeals did not reverse the erroneous October 24, 1994 Order denying Plaintiff's Motion to Remand but erroneously affirmed the denial of Plaintiffs' Motion to Remand, contrary to binding precedents.

On July 31, 1995, the District Court entered an Order granting Defendant Chris Motors Corporation's Motion for Summary Judgment. (R-54-1); On November 30, 1995, the

District Court entered an Order granting BMW AG's and BMW NA 's motion for summary judgment (R 9-84-1; Document #84, page 1). In both the July 31, 1995 Order and the November 30, 1995 Order, the District Court ignored affidavits and other evidence favorable to Plaintiff, weighed and resolved conflicts in the evidence, made credibility findings, and decided factual issues; and Plaintiff Linda Dagi submits that the Draconian approach taken by the District Court is inconsistent with the record which shows numerous genuine issues of material facts which establish the liability of Chris Motors, BMW AG, and BMW NA, and is contrary to the State and Federal substantive law and is contrary to the legal standards to be applied in ruling on motions for summary judgment. The United States Court of Appeals did not reverse the erroneous July 31, 1995 Order and November 30, 1995 Order of the District Court granting numerous judgments for the Defendants, but erroneously affirmed said orders, contrary to binding precedents, without analysis or discussion. The Eleventh Circuit's entire ruling on the erroneous grants of the motion for summary judgment consists of the erroneous conclusion at page 3 of its November 21, 1996 Order and Judgment: "The remainder of Dagi's assertions of error are rejected for the reasons set forth in the district courts thorough and thoughtful orders dated July 31, 1995 and November 30, 1995," Appendix, page 15a.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

Petitioner Linda Dagi respectfully submits that the issues addressed in her Petition for Writ of Certiorari are matters of importance, gravity and great concern to the Bench, the Bar, and the public which go to the very heart of the duty of the judiciary to uphold established principles of law that are

binding precedents under the doctrine of *stare decisis* and the rule of binding precedent. These issues are, as follows:

1. The Petition for Writ of Certiorari should be granted, for the reason that the Eleventh Circuit Court of Appeals erred in misconstruing and misapplying the decision in Caterpiller, Inc. v. Williams, 482 U.S. 386, 107 S. Ct. 2425, 96L. Ed. 2d 318 (1987), with respect to the case *sub judice*, since the initial Complaint was, in fact, a well-pleaded Complaint that contained all of the elements of a federal odometer fraud claim under 15 United States Code §1981, 1989) and erred in not reversing the District Court and directing that the case be remanded to the State Court of Fulton County, Georgia, pursuant to 28 United States Code §1447 (c), since Chris Motors Corporation's attempted removal sixteen months after receipt of said initial Complaint was untimely, in that the case was not removed to the United States District Court within 30 days of the receipt of the initial Complaint stating a claim for federal odometer fraud, as required by the removal statute 28 United States Code §1446(b).

The decisions of the District Court and the Eleventh Circuit Court of Appeals are in conflict with the decisions of this Court pertaining to the well-pleaded complaint rule and are contrary to the doctrine of *stare decisis* and the rule of binding precedent. Hilton v. South Carolina Public Railway Commission, 502 U.S. 197, 112 S. Ct. 560, 116 l.Ed 2d 560 (1991); and Johnson v. DeSoto County board of Commissioners 72 F. 3d 1556 (11th Cir. 1996).

The appellate panel erred in misconstruing and misapplying the Caterpillar, Inc. v. Williams, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed. 2d 318, (1987) decision to the case sub judice, since the initial complaint was, in fact, a well-

pleaded complaint that contained all of the elements of a federal odometer fraud claim under 15 United States Code §§1981, 1989). The Defendants attempted removal sixteen months after receipt of said initial complaint was untimely, in that the case was not removed to the United States District Court within 30 days of the receipt of the initial complaint stating a claim for federal odometer fraud, as required by the removal statute, 28 United States Code §1446(b).

Petitioner shows that the Writ of Certiorari, should be granted, since the November 21, 1996 Opinion and Judgment of the appellate panel of the Eleventh Circuit Court of Appeals, Appendix pages 13a-15a, 16a-17a, constitutes a radical departure from binding precedents regarding removal jurisdiction, which hold that well-pleaded complaints must be removed within 30 days. Consideration by the Supreme Court is necessary to secure and maintain uniformity of decisions in this Court, as to the well-pleaded complaint doctrine as set out in cases of the Eleventh Circuit Court of Appeals and the Supreme Court of the United States. This is a question of exceptional importance to the Bench, the Bar, and the public, in that the appellate panel decision is in conflict with binding precedents and causes confusion and lack of uniformity as to the applicable law.

In its November 21, 1996 Opinion and Judgment, the appellate panel erred in misconstruing and misapply the decision in Caterpillar, Inc. v. Williams, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed. 2d 318 (1987) to the case sub judice, since the initial complaint was, in fact, a well-pleaded complaint that contained all of the elements of a federal odometer fraud claim under 15 United States Code §§1981, 1989.

The essential elements of a federal odometer fraud claim is stated paragraphs 33 through 38 of the initial complaint, as follows:

Paragraph 33

Defendant Chris Motors represented and certified to Plaintiff Dagi that the subject BMW 535i automobile had been driven only 5,351 miles via an Odometer Disclosure Statement;

Paragraph 34

At the time in which Defendant Chris Motors represented and certified to Plaintiff Dagi that the subject BMW 535i automobile had only 5,351 miles through said Odometer Disclosure Statement, Defendant Chris Motors knew that such representation to Plaintiff Dagi as to the mileage of said vehicle was false;

Paragraph 35

Defendant Chris Motors made such representation regarding the mileage of said BMW 535i vehicle with the intention and purpose of deceiving Plaintiff Dagi;

Paragraph 36

Plaintiff Dagi reasonably relied upon Defendant Chris Motors' representation and certification as to the mileage of the subject BMW 535i automobile;

Paragraph 37

As a result of Defendant Chris Motors' fraudulent representation with respect to the mileage of the subject BMW 535i automobile, Plaintiff Dagi sustained damages;

Paragraph 38

By reason of the foregoing, Plaintiff Dagi is entitled to recover from Defendant Chris Motors damages in such an amount as may be shown by the evidence and determined by the jury in their enlightened conscience.

In its November 21, 1996 Opinion and Judgment, Appendix pages 13a-15a, 16a-17a, the appellate panel erred in misconstruing and failing to apply applicable authorities pertaining to well-pleaded complaints, including: Caterpillar, Inc. v. Williams 482 U.S. 386, 107 S. Ct. 2423, 96 L.Ed. 2d 318 (1987); Gable v. Local Union #387, 695 F.Supp. 1174 (N.D. Ga. 1988) (in which the court held, at page 1175: "The reviewing court looks to the sub-stance of the complaint and not the labels used in it."); Golke v. Lee Lumber & Building Materials Corporation, 671 F.Supp. 568 (1987) (in which the court held, at page 571: "A close scrutiny of the amended compliant reveals that the content and substance of the initial complaint remains unchanged . . . Lee Lumber should have filed its removal petition within 30 days of receiving Golke's initial complaint."); Downey v. Geary-Wright Tobacco Company, 39 F.Supp 33 (E.D. Ky. 1941) (in which the court stated, at page 36: "As the court takes judicial notice of the federal law involved, the omission of specific reference thereto in the pleadings is immaterial."); Kolkin v. Gotham Sportswear, 10 F.Supp. 682 (S.D. N.Y. 1935) (in which the Court stated, at page 684: "It does not matter that the Sherman

Anti-Trust Act and the Clayton Act are not mentioned by name in the complaint."); and 76 Corpus Juris Secundum Removal of Causes §75, at page 968, wherein it is stated: "The omission from Plaintiff's pleading of a specific reference to any law of the United States does not prevent removal where the allegations of such pleading show that the suit arises under a law of the United States."

The initial well-pleaded complaint setting forth all of the elements of a federal odometer fraud claim was received by Chris Motors Corporation on April 7, 1993, and was received by BMW of North America, Inc. on March 22, 1993. (See September 12, 1994 Affidavit of Thomas Allan Rice in Support of Plaintiff's Motion to Remand, (R 3-5-23;). The attempted removal took place on August 12, 1994, when the Defendants filed a Petition for Removal (R 1-1-1;) and Notice of Removal (R 1-1-254;)

The Defendants' attempted removal sixteen months after receipt of said complaint was untimely, in that the case was not removed to the United States District Court within thirty days of the receipt of the initial complaint stating a claim for federal odometer fraud as required by the removal statute, 28 United States Code §1446(b).

Therefore, the District Court committed reversible error in its October 24, 1994 Order in denying Plaintiff's Motion to Remand to state court pursuant to 28 United States Code §1447(c) (R 4-10-11;) and the appellate panel of the Eleventh Circuit Court of Appeals committed reversible error in affirming the denial of Appellant Linda Dagi's Motion to Remand to state court. Therefore, the Writ of Certiorari should issue, the decisions of the District Court and Eleventh Circuit Court of Appeals should be reversed and the case remanded to

the State Court of Fulton County, pursuant to 28 United States Code §1447 (c).

2. The Petition for Writ of Certiorari should be granted, for the reason that the decisions of the United States District Court and the Eleventh Circuit Court of Appeals violate the principle established by Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938), that state law issues of tort liability for cases occuring in Georgia are governed by the decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia.

The District Court and the Eleventh Circuit Court of Appeals erred in overlooking and not considering material facts in the record that establish that there are genuine issues of fact as to whether Defendant Chris Motors Corporation is liable for common law fraud and negligent misrepresentations recklessly made, in connection with odometer disconnection and tampering and false representation as to the actual mileage on the BMW automobile, erred in overlooking and not considering decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia [including Harris v. Mullins, 32 Ga. 704 (1861); Larey v. Taliaferro, 57 Ga. 443 (1876); City Dodge v. Garnder, 232 Ga. 766, 208 S.E. 2d 794 (1974); Bill Spreen Toyota, Inc. v. Jenquin, 163 Ga. App. 855, 294 S.E. 2d 533 (1982); Rivers v. BMW of North America, Inc. 214 Ga. App. 880, 449 S.E. 2d 337 (1994); Harmon v. BMW of North America, Inc. Case No. A94A21003 in the Court of Appeals of Georgia, decided January 26, 1995 (a copy of said unreported decision is included in the Appendix as Exhibit 23, at page 141a); and Crown Ford, Inc. v. Crawford, 221 Ga. App. 881, 473 S.E. 2d 554 (1996), which cases hold that a plaintiff can make an election to sue for common law fraud and negligent misrepresentations recklessly made, without rescinding a

contract to purchase a vehicle, and hold that such actions for fraud and negligent misrepresentation are not barred by a merger clause contained in sales contract and are not barred by an "as is" clause contained in a disclaimer of warranties], which decisions are binding precedents under Erie R. Co. v. Tompkins 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

The July 31, 1995 decisions of the District Court granting Defendant Chris Motors Corporation's motion for summary judgment, Appendix pages 26a-44a and the decision of the Eleventh Circuit Court of Appeals affirming the grant of Chris Motors Corporations' motion for summary judgment , Appendix, pages 13a-15a, 16a-17a are erroneous and should be reversed. Therefore, the Writ of Certiorari should issue, the decisions of the District Court and the Eleventh Circuit Court of Appeals regarding the granting of Chris Motors Corporation's motion for summary judgment should be reversed, and the case remanded for trial on the merits of Plaintiff Linda Dagi's claims for common law fraud and negligent misrepresentations recklessly made in the States Court of Fulton County, Georgia.

Petitioner Linda Dagi shows that a Writ of Certiorari should be granted, since the November 21, 1996 Opinion and Judgment of the appellate panel of the Eleventh Circuit Court of Appeals, Appendix, pages 16a-17a constitutes a radical departure from established law, in that the appellate panel overlooked and did not consider decisions of the Georgia Supreme Court and the Georgia Court of Appeals that are binding precedents under Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938). Consideration by the Supreme Court on Writ of Certiorari is necessary to secure and maintain adherence to the principle established in Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

This is a question of exceptional importance to the Bench, the Bar, and the public, in that the appellate panel decision is in conflict with binding precedents and causes confusion and lack of uniformity as to the applicable law.

Said binding precedents clearly establish that there are genuine issues of material fact as to whether Defendant Chris Motors Corporation is liable for common law fraud and negligent misrepresentations recklessly made in connection with odometer disconnection and tampering and false representations as to the actual mileage on the BMW automobile.

Said binding precedents also clearly establish that, under Georgia law, a plaintiff has an election of remedies in an action involving the purchase of an automobile and can affirm the contract and sue for damages for common law fraud and negligent misrepresentations recklessly made.

Said binding precedents also clearly establish that the Plaintiff Linda Dagi's claims of fraud and negligent misrepresentations recklessly made are not barred by the merger clause contained in the Retail Buyer's Order or the "as is" language contained in the Buyer's Guide. Bill Spreen Toyota, Inc. v. Jenquin, 163 Ga. App. 855, 294 S.E. 2d 533 (1994). See also, Silva v. Stevens, Supreme Court of Vermont, 589 A. 2d 852 (1991) in which the "as is" clause is discussed and Bill Spreen Toyota, Inc. v. Jenquin, 163 Ga. App. 855, 294 S.E. 2d 533 (1982) is followed.

The District Court committed reversible error in granting Defendant Chris Motors Corporation's Motion for Summary Judgment (See July 31, 1995 Order granting summary judgment in favor of Chris Motors Corporation, (R 8-

54-1;) and November 2, 1995 Judgment entered in favor of Chris Motors Corporation, (R 9-77-1;) and the appellate panel of the Eleventh Circuit Court of Appeals committed reversible error in affirming the grant of Defendant Chris Motors Corporation's Motion for Summary Judgment, Appendix, pages 13a-15a, 16a-17a.

3. The Petition for Writ of Certiorari should be granted, for the reason that this District Court and the Eleventh Circuit Court of Appeals erred in overlooking and not considering material facts in the record that establish that there are genuine issues of material facts as to whether Plaintiff Linda Dagi is entitled to recover on her federal odometer fraud claim under 15 Unit[illegible] States Code §§ 1981, 1989, erred in overlooking and not considering decisions of the old (pre-November 1, 1980) Fifth Circuit Court of Appeals and decisions of the Eleventh Circuit Court of Appeals [Nieto v. Pence, 578 F.2d 640 (5th Cir. 1978); and Huycke v. Greenway, 876 F.2d 94 (11th Cir. 1989), which hold that a Plaintiff need not show actual intent to fraud in a federal odometer fraud claim, but may establish a violation of the Federal Odometer Act, by relying on circumstantial evidence to show constructive knowledge that the actual miles on a vehicle are greater than the miles shown on the odometer and greater than the miles shown on the federal odometer disclosure statement], which decisions are binding precedents under Bonner v. City of Pritchard, Alabama, 661 F.2d 1206 (11th Cir. 1980), the doctrine of *stare decisis* under Hilton v. South Carolina Public Railway Commission, 502 U.S. 197, 112 S.Ct. 560, 116 L. Ed. 2d 560 (1991) and the rule of binding precedent under Johnson v. DeSoto County Board of Commissioners, 72 F.3d 1556 (11th Cir. 1996).

The District Court and the Eleventh Circuit Court of Appeals also erred in overlooking and not considering other

decisions that are persuasive authority, including Suits v. Little Motor Company 642 F. 2d 883 (5th Cir. 1987); Reiff v. Don Rosen Cadillac-BMW, Inc. 501 F. Supp. 77 (E.D. Penn. 1980); S & S Toyota, Inc. v. Kirby, Fla. App. 649 So. 2d 916 (1995) (following Nieto v. Pence) Fort Lauderdale Lincoln Mercury, Inc. v. Fallaro, Fla. App. 616 So.2d 594 (1993) (following Nieto v. Pence); and Bill Terry's, Inc. v. Atlantic Motor Sales, Inc. Fla. App. 409 So.2d 507 (1982) (following Nieto v. Pence).

Petitioner Linda Dagi shows that a Writ of Certiorari should be granted, since the July 31, 1995 Order of the District Court granting Defendant Chris Motors Corporation's motion for summary judgment, (R 8-54-1) and Appendix pages 26a-44a. and the November 21, 1996 Opinion and Judgment of the Eleventh Circuit Court of Appeals, Appendix, pages 13a-15a and 16a-17a, constitute a radical departure from established law, in that the District Court and the Eleventh Circuit Court of Appeals overlooked and did not consider decisions of the Fifth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals and that are binding precedents.

Consideration by the Supreme Court on Writ of Certiorari is necessary to secure and maintain uniformity of decisions of the Fifth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals that are binding precedents. This is a question of exceptional importance to this Bench, the Bar and the public in that the appellate panel decision is in conflict with binding precedents and causes confusion and lack of uniformity as to the applicable law.

4. The Petition for Writ of Certiorari should be granted for the reasons that the United States District Court violated cardinal rules regarding decisions on motions for summary

judgment, when the District Courts in its July 31, 1995 and November 30, 1996 orders granting the motions for summary judgment of Defendants Chris Motors Corporation, Bayerische Motoren Werke, A.G. and BMW of North America, Inc., Appendix pages 26a-44a and Appendix pages 68a-90a, the District Court weighed the evidence and made credibility findings, contrary to the controlling legal standards applicable to motions for summary judgment as stated in Clemons v. Dougherty County, Georgia, 684 F.2d 1294, 1297 (11th Cir. 1982); Warrior Tombigbee Transportation Company, Inc. v. M/V Nan Fung, 695 F.2d 1294, 1297 (11th Cir. 1983); and Samples on Behalf of Samples v. City of Atlanta, 846 F.2d 1328 (11th Cir. 1988) and the United States Court of Appeals for the Eleventh Circuit abdicated its duty to conduct a de novo review, recognize and reverse the erroneous approach taken by the District Court, contrary to the standards stated in the Clemons, Warrior Tombigbee Transportation Company, Inc. and Samples on Behalf of Samples cases.

This erroneous approach in determining motions for summary judgment was also criticized by the Third Circuit Court of Appeals, in Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F. 2d 1358, (3rd Cir. 1992), in which the Court stated, at page 1363:

> "When deciding a motion for summary judgment . . . a court's role remains circumscribed in that it is inappropriate for a court to resolve factual disputes and to make credibility determinations."

Since the District Court and the Eleventh Circuit Court of Appeals erred in failing to apply the controlling legal standards in deciding the motions for summary judgment filed

by Chris Motors, BMW, AG, and BMW NA, this Court should grant a Writ of Certiorari, reverse the Order and Judgment granting summary judgment in favor of Chris Motors and reverse the Order and Judgment granting summary Judgment in favor of BMW AG and BMW NA. Therefore, both Case No. 95-9501 and Case No. 96-8025 should be reversed and remanded for trial on the merits.

5. The Petition for Writ of Certiorari should be granted, for the reason that the erroneous decision of the United States Court of Appeals for the Eleventh Circuit was reached because the Court of Appeals arbitrarily denied Appellant Linda Dagi's request for oral argument and arbitrarily assigned the case to the Non-Argument Calendar, contrary to the Court of Appeals' policy to grant oral argument where important and complex issues are presented on appeal.

At pages ii and iii of Brief of Appellant in Case Numbers 95-9501 and 96-8025 in the United States Court of Appeals for the Eleventh Circuit, Appellant Linda Dagi made the following Statement Regarding Oral Argument: Plaintiff/Appellant believes that oral argument is necessary in this case. Plaintiff/Appellant submits that this case is appropriate for assignment to the Oral Argument Calendar, for the reasons that: (1) this case is one of first impression as to error in denying a Motion to Remand a case to State Court, where it was not timely removed to Federal Court; (2) this case involves important issues pertaining to an automobile dealership's liability for common law fraud in connection with odometer disconnection and tampering, false representations as to the actual mileage on an automobile, false representations as to acid rain damage and the repainting of an automobile, and liability for violations of the Federal Odometer Fraud Act, 15 U.S.C. §§1981-1991; (3) this case involves an important issue

of the admissibility opinion testimony of a lay witness under Rule 701 of the Federal Rules of Evidence, in connection with Bill Hudson's affiant testimony that he had examined and photographed the tires on this BMW automobile and that, in his opinion, the BMW automobile has been driven more miles than the mileage shown on the odometer; (4) this case involves an important issue of the preclusion of use of expert witnesses; (5) this case involves an important issue as to the right of a party to amend her complaint to conform to the evidence in the case; (6) this case involves important issues as to an automobile manufacturer's strict liability for defects in the brakes, throttle housing unit, and floor mats of an automobile, strict liability for failure to warn about said defects in an automobile, strict liability for design defects in the odometer, and strict liability for failure to warn about design defects in the odometer; and (7) this case involves important issues as to an automobile importer/distributor's liability for negligence in failing to warn about design defects in the odometer of an automobile, and liability for deceit in failing to disclose that an automobile has been damaged by acid rain and repainted.

Counsel for Plaintiff has always found that oral argument is extremely important to clarify the facts, issues and law.

In a recent case in the Eleventh Circuit Court of Appeals, Michael v. Norfolk Southern Railway Company, 74 F. 3d 271 (11th Cir. 1996), oral argument was a crucial factor in obtaining the reversal of summary judgments in two wrongful death cases.

There are numerous law review articles authored by eminent jurists that show the importance of oral argument in cutting through the rhetoric in appellate briefs and focusing upon the crux of the issues to be decided. See, in this

connection: Bright & Arnold, Oral Argument - It May Be Crucial, 70 A.B.A. Journal 68 (December 1984), in which the author stated, at page 68: "oral argument most often changed my mind when it brought to the fore a significant fact that the briefs had not sufficiently emphasized, when the briefs had not stated an applicable rule of law clearly or correctly or when the issues of fact or law were close" (written by U.S. Circuit Court Judge Myron H. Bright and U.S. Circuit Court Judge Richard S. Arnold); Bright, The Power of the Spoken Word: In Defense of Oral Argument, 72 Iowa Law Review 35 (October 1986), in which the author states, at page 36: "In my opinion, oral argument is an essential component of the decision making process and plays an important role in assisting the appellate judge in reaching a decision. As I recently wrote in another article: The argument can isolate and clarify the core issues. [Vague points, complex points, and points that were simply overlooked] may become evident during oral argument." (written by U.S. Circuit Court Judge Myron H. Bright); C. HUGHES, THE SUPREME COURT OF THE UNITED STATES, pages 61-62 (1928)(in which Mr. Chief Justice Hughes wrote: "I suppose that, aside from cases of exceptional difficulty, the impression that a judge has at the close of a full oral argument accords with the conviction which controls his final vote"); Harlan, What Part Does the Oral Argument Play in The Conduct on Appeal?, 41 Cornell Law Quarterly 6, 11 (1955)(in which Mr. Justice Harlan wrote that oral argument was perhaps the most effective weapon of the advocate and advised that it should be given the time and attention it deserves); Jackson, Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations, 37 A.B.A. Journal 801 (1951) (in which Mr. Justice Jackson stated: "I think that the Justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations . . . The Bar must make its preparation for oral argument on the principle

that it always is of the highest, and often controlling, importance."); and Rehnquist, Oral Advocacy, 27 South Texas Law Review 289 (Summer 1986) (in which Mr. Justice Rehnquist wrote, at page 289, footnote 1: "Justices of the Supreme Court of the United States have almost unanimously agreed that effective oral advocacy is one of the most powerful tools of the profession." Mr. Justice Rehnquist then quoted from the writings of Mr. Chief Justice Hughes, Mr. Justice Harlan, and Mr. Justice Jackson mentioned herein and went on to cite numerous other writings concerning the importance of oral arguments).

Petitioner Linda Dagi respectfully submits that the Court of Appeals for the Eleventh Circuit acted arbitrarily in denying her request for oral argument and acted arbitrarily assigning the case to the Non-Argument Calendar and that this arbitrary action kept the appellate panel from understanding the facts, the issues and the applicable law. Petitioner asks that a Writ of Certiorari issue to review this arbitrary denial of her request for oral argument and the arbitrary assignment of the case to a Non-Argument Calendar.

Petitioner respectfully submits that, had her request for oral argument been granted and Case Number 95-9501 and 96-8025 been assigned to an Oral Argument Calendar, the appellate panel would have understood the facts, the issues, and the applicable law and would not have entered the erroneous November 21, 1996 Opinion and Judgment, which decision affirmed the erroneous October 24, 1994 Order denying Plaintiff's Motion to Remand pursuant to 28 United States Code § 1447(o); affirmed the erroneous July 31, 1995 Order and November 2, 1995 Judgment granting defendant Chris Motor Corporation motion for summary judgment, and affirmed the erroneous November 30, 1995 Order and

December 1, 1995 Judgment granting the Motions for Summary Judgment of Defendant Bayerische Motoren Werke, A.G. (BMW AG) and Defendant BMW of North America, Inc. (BMW NA).

Had oral argument been presented in this case, the appellate panel would have:

A: followed the binding precedents requiring remand of the case to the State Court of Fulton County;

B: would have followed the decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia which established:

(1) a plaintiff can elect to bring an action in tort for common law fraud and negligent misrepresentations recklessly made without rescinding a contract for purchase of an automobile;

(2) said fraud is not barred by an "as is" clause in a warranty disclaimer; and which decisions of the Supreme Court of Georgia and the Court of Appeals are binding precedents under Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938);

C: would have followed decisions of the old (pre November 1, 1980) Fifth Circuit Court of Appeals and the decisions of the Eleventh Circuit Court of Appeals, including Nieto v.

Pence, 578 F. 2d 640 (5th Cir. 1978); and Huycke v. Greenway, 1876 F. 2d 94 (11th Cir. 1989); which hold that a plaintiff need not show an actual intent to defraud in a federal odometer fraud claim, but may establish a violation of the Federal Odometer Act by relying on circumstantial evidence to show constructive knowledge that the actual mileage on a vehicle are greater than the miles shown on the odometer greater than the miles shown on the federal odometer disclosure statement, which decisions are binding precedents under Bonner v. City of Pritchard, Alabama, 661 F. 2d 1206 (11th Cir. 1980), and the doctrine of *stare decisis* under Hilton v. South Carolina Public Railway Commission, 502 U.S. 197, 112 S.Ct. 560 116 L. Ed. 2d 560 (1991) and the rule of binding precedent under Johnson v. DeSoto County Board of Commissioners, 72 F. 3d 1556 (11th Cir. 1996) and

D: would not have affirmed the erroneous July 31, 1995 Order granting summary judgments in favor of Defendants Chris Motor Corporation and would not have affirmed the erroneous November 30, 1995 Order granting summary judgment in favor of Defendants Bayerische Motoren Werke, A.G. and BMW of North America, Inc., since in both the July 31, 1995 Order and the November 30, 1995 Order, the District Court weighed the evidence and made credibility findings contrary to the controlling legal standards applicable to motions for summary judgment, as stated in Clemons v.

Dougherty County, Georgia, 684 F. 2d 1294, 1297 (11th Cir. 1982); Warrior Tombigbee Transportation Company, Inc. v. M/V Nan Fung, 695 F. 2d 1294, 1297 (11th Cir. 1983); Samples on Behalf of Samples v. City of Atlanta, 846 F. 2d 1328 (11th Cir. 1988); and Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F. 2d 1358 (3rd Cir. 1992).

CONCLUSION

For the reasons shown above, Petitioner Linda Dagi's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

LINDA DAGI,
Petitioner,

v.

CHRIS MOTORS CORPORATION,
BAYERISCHE MOTOREN WERKE, A.G.,
and BMW OF NORTH AMERICA, INC.,
Respondents.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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154 pp

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United States Court of Appeals for the Eleventh Circuit

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INTRODUCTION

In view of the number of Exhibits and number of pages to be included in the Appendix to Petition for Writ of Certiorari, the Appendix is contained in a separate volume from the volume containing this Petition for Writ of Certiorari, as provided by Supreme Court Rule 14 (i), which provides: "If the material required by this subparagraph is voluminous, it may be presented in a separate volume or volumes with appropriate covers."

Attached hereto are Exhibits 1 through 5, Decisions, Judgments and Orders in Linda Dagi, Plaintiff/Appellant vs. Bayerische Motoren Werke, A.G., BMW of North America, Inc. and Chris Motors Corporation, Case Numbers 95-9501 and 96-8025 in the United States Court of Appeals for the Eleventh Circuit; Exhibits 6 through 15, Decisions, Judgments and Orders in Linda Dagi, Plaintiff vs. Bayerische Motoren Werke, A.G., BMW of North America, Inc. and Chris Motors Corporation, Defendants, Civil Action File No. 1-94-CV-2135 - JEC in the United States District Court for the Northern District of Georgia, Atlanta Division; Exhibits 16 through 33, Significant Exhibits which appear in the record before the United States District Court and the record before the United States Court of Appeals for the Eleventh Circuit.

This 22nd day of April, 1997.

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Attached hereto are the following Exhibits that are included in the Appendix to Petition for Writ of Certiorari:

Exhibits 1 through 5, Decisions, Judgments and Orders in Linda Dagi, Plaintiff/Appellant vs. Bayerische Motoren Werke, A.G., BMW of North America, Inc. and Chris Motors Corporation, Case Number 95-9501 and 96-8025 in the United States Court of Appeals for the Eleventh Circuit; Exhibits 6 through 15, Decisions, Judgments, and Orders in Linda Dagi, Plaintiff v. Bayerische Motoren Werke, A.G., BMW of North America, Inc. and Chris Motors Corporation, Defendants, Civil Action File No. 1-94-CV-2135-JEC in the United States District Court for the Northern District of Georgia, Atlanta Division; and Exhibits 16 through 33, Significant Exhibits which appear in the record before the United States District Court and appear in the record before the United States Court of Appeals for the Eleventh Circuit.

Note: Record References in parentheses following Description of Documents for Exhibits 6 through 22 [e.g., R 1-1-129 for Exhibit Number 6] refer to Record References for the Record on Appeal in Case Numbers 95-9501 and 96-8025.

EXHIBITS: DECISIONS, JUDGMENTS AND ORDERS IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

EXHIBIT NUMBER	DESCRIPTION OF DOCUMENTS	APPENDIX PAGES
1	November 21, 1996 Decision of the United States Court of Appeals for the Eleventh Circuit, affirming the District Court's denial of Plaintiff Linda Dagi's Motion to Remand to State Court pursuant to 28 United States Code §1447 (c); affirming the District Court's grant of the Appellees' respective Motions for Summary Judgment; affirming other Orders of the District Court; and denying Appellant's Request for Oral Argument.	13a-15a
2	November 21, 1996 Judgment entered by the Clerk of the Eleventh Circuit Court of Appeals	16a-17a

EXHIBIT NUMBER	DESCRIPTION OF DOCUMENTS	APPENDIX PAGES
3	January 22, 1997 Order of the United States Court of Appeals for the Eleventh Circuit denying Appellant Linda Dagi's Petition for Panel Rehearing and Suggestion of Rehearing *En Banc*.	18a-19a
4	February 11, 1997 Order denying Appellant's Motion for Stay of Mandate.	20a-21a
5	March 5, 1997 Order denying Appellant's Motion for Correction of Clerical Error, Recall of Mandate, and Stay of Mandate.	22a-23a
	EXHIBITS: DECISIONS, JUDGMENTS, AND ORDERS IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION	
6	July 14, 1993 District Court Order Adding Bayerische Motoren Werke, A.G. as a Defendant (R 1-1-129)	24a

EXHIBIT NUMBER	DESCRIPTION OF DOCUMENTS	APPENDIX PAGES
7	October 24, 1994 District Court Order Denying Motion to Remand to State Court Pursuant to 28 United States Code §1447(c) (R 3-5-1)	25a
8	July 31, 1995 District Court Order granting summary judgment in favor of Chris Motors Corporation and ruling on objections to portions of Johnson and Sweeny Affidavits. (R 8-54-1)	26a-44a
9	July 31, 1995 District Court Order regarding discovery matters. (R 8-55-1)	45a-47a
10	July 31, 1995 District Court Protective Order regarding confidentiality of Bayerische Motoren Werke, A.G. documents. (R 8-56-1)	58a-62a

EXHIBIT NUMBER	DESCRIPTION OF DOCUMENTS	APPENDIX PAGES
11	November 2, 1995 District Court Judgment entered in favor of Chris Motors Corporation against Plaintiff Linda Dagi granting Motion for Summary Judgment. (R 9-77-1)	63a
12	November 9, 1995 District Court order directing BMW, AG to file supplementary affidavit. (R 9-78-1)	64a-65a
13	November 22, 1995 District Court Order directing BMW, AG to produce documents (R 9-83-1)	66a-67a
14	November 30, 1995 District Court Order denying Plaintiff's Motion to Amend Complaint, granting summary judgment in favor of BMW, AG and BMW, NA; and granting in part and denying in part Defendants' Motions to Strike portions of Affidavits. (R 9-84-1)	68a-90a

EXHIBIT NUMBER	DESCRIPTION OF DOCUMENTS	APPENDIX PAGES
15	December 1, 1995 District Court Judgment entered in favor of BMW, AG and BMW, NA against Plaintiff Linda Dagi, on Order granting Defendants' Motions for Summary Judgment. (R 9-85-1)	91a
	EXHIBITS: SIGNIFICANT EXHIBITS WHICH APPEAR IN THE RECORD BEFORE THE UNITED STATES DISTRICT COURT AND WHICH APPEAR IN THE RECORD BEFORE THIS UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT	
16	March 19, 1993 Initial Compliant for Damages in Linda Dagi, Plaintiff vs. BMW of North America, Inc. and Chris Motors Corporation, Defendants, in the State Court of Fulton County, Georgia. (R 1-1-6)	92a-102a

EXHIBIT NUMBER	DESCRIPTION OF DOCUMENTS	APPENDIX PAGES
17	August 12, 1994 Petition for Removal in Civil Action No. 1-94-CV-2135-JEC in the United States District Court (attachments omitted). (R 1-1-1 through 253)	103a-107a
18	August 12, 1994 Notice of Removal in Civil Action File No. 1-94-CV-2135-JEC in the United States District Court (attachments omitted) (R 1-1-254)	108a-110a
19	September 12, 1994 Plaintiff's Motion to Remand to the State Court of Fulton County [Note: the Thirtieth day after service of Defendants' Petition to Remand and Notice to Remand fell on Sunday, September 11, 1994; therefore, Plaintiff Linda Dagi's Motion to Remand was timely when it was filed on Monday, September 12, 1994]. (R 3-5-1 through 367)	111a-115a

EXHIBIT NUMBER	DESCRIPTION OF DOCUMENTS	APPENDIX PAGES
20	September 12, 1994 Brief in Support of Plaintiff's Motion to Remand. (R 3-5-1 through 367)	116a-127a
21	September 12, 1994 Notice of Motion to Remand Removed Action. (R 3-5-1 through 367)	128a-130a
22	October 13, 1994 Reply Brief in Support of Plaintiff's Motion to Remand. (R 4-9-1)	131a-140a
23	January 25, 1995 copy of unreported decision in Harmon v. BMW of North America, Inc., case no. A94A21003 in the Court of Appeals of Georgia.	141a-142a
24	April 2, 1992 Retail Buyer's Order, Plaintiff's Exhibit 1 (two pages)	143a-144a
25	April 2, 1992 Buyer's Guide.	145a

EXHIBIT NUMBER	DESCRIPTION OF DOCUMENTS	APPENDIX PAGES
26	April 2, 1992 Odometer Disclosure Statement, Plaintiff's Exhibit 2	146a
27	April 2, 1992 Title Application Plaintiff's Exhibit 3	147a
28	April 2, 1992 Transfer of Title, Plaintiff's Exhibit 4	148a
29	Title and Tag Application, Plaintiff's Exhibit 5	149a
30	Photograph of tire on BMW automobile, Plaintiff's Exhibit 86-7	150a
31	Photograph of tire on BMW automobile Plaintiff's Exhibit 86-9	151a
32	November 13, 1992 Document pertaining to recalls of throttle housing unit on 1991 BMW 535 automobiles, Plaintiff's Exhibit 62	152a

EXHIBIT NUMBER	DESCRIPTION OF DOCUMENTS	APPENDIX PAGES
33	Straight bill of lading with notation of acid rain damage to the subject BMW automobile, Plaintiff's Exhibit 85	153A

EXHIBIT 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-9501
Non-Argument Calendar

D. C. Docket No. 1:94-CV-2135-JEC

LINDA DAGI,
Plaintiff-Appellant,

versus

BAYERISCHE MOTOREN WERKE, A.G.,
Defendant-cross-defendant-Appellee,

BMW OF NORTH AMERICA, INC.,
Defendant,

CHRIS MOTORS CORPORATION,
Defendant-cross-claimant-Appellee.

[stamp—DO NOT PUBLISH]

[stamp—Filed, U.S. Court of Appeals, Eleventh Circuit,
NOV 21 1996, Miguel J. Cortez, Clerk]

No. 96-8025
Non-Argument Calendar

D. C. Docket No. 1:94-cv-2135-JEC

LINDA DAGI,
Plaintiff-Appellant,

versus

BAYERISCHE MOTOREN WERKE, A.G.,
Defendant-cross-defendant-Appellee,

BMW OF NORTH AMERICA, INC.,
Defendant-Appellee,

CHRIS MOTORS CORPORATION,
Defendant-cross-claimant.

Appeals from the United States District Court
for the Northern District of Georgia

(November 21, 1996)

Before HATCHETT, Chief Judge, TJOFLAT and KRAVITCH, Circuit Judges.

PER CURIAM:

Appellant Dagi appeals the district court's orders denying Dagi's Motion to Remand, to Compel Discovery and for Leave to File a Fourth Amended Complaint, excluding Dagi's belatedly disclosed expert witness and granting appellees' respective Motions for Summary Judgment on all claims. We affirm.

Dagi filed this motion against appellees alleging they committed various fraud and product-liability torts in their respective roles as manufacturer, distributor and seller of a 1991 BMW 535i demonstrator vehicle. Dagi damaged the vehicle when she rear-ended another motorist on a rain-soaked street.

As a preliminary matter, Dagi contends the district court erred in denying her Motion to Remand the case to state court. Appellees did not remove the case to federal court until Dagi added a federal odometer fraud claim, 49 U.S.C. §§ 32701-32711. Dagi asserts this removal was untimely under 28 U.S.C. § 1446(b) because appellees' thirty-day

removal window ran from the filing of the original complaint. She insists the fraud claims stated in the initial pleading, while not so stated, were in substance federal claims. This argument lacks merit. Dagi's initial pleadings omitted some of the elements of a federal odometer claim and thus, appellees had no prior basis to remove the case. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (ruling that federal jurisdiction exists for removal only when it appears on the face of a well-pleaded complaint).[1]

The remainder of Dagi's assertions of error are rejected for the reasons set forth in the district court's thorough and thoughtful orders dated July 31, 1995 and November 30, 1995.

AFFIRMED. The parties' request for oral argument is DENIED.

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[1] Dagi mistakenly relies upon cases in which defendants failed to discern from the face of a well-pleaded complaint that federal law preempted state-law claims or that diversity existed. This case presents no such circumstances.

EXHIBIT 2

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-9501
Non-Argument Calendar

D. C. Docket No. 1:94-CV-2135

LINDA DAGI,
Plaintiff-Appellant,

versus

BAYERISCHE MOTOREN WERKE, A.G.,
Defendant-cross-defendant-Appellee,

BMW OF NORTH AMERICA, INC.,
Defendant,

CHRIS MOTORS CORPORATION,
Defendant-cross-claimant-Appellee.

[stamp—Filed, U.S. Court of Appeals, Eleventh Circuit,
NOV 21 1996, Miguel J. Cortez, Clerk]

No. 96-8025
Non-Argument Calendar

D. C. Docket No. 1:94-cv-2135

LINDA DAGI,
Plaintiff-Appellant,

versus

BAYERISCHE MOTOREN WERKE, A.G.,
Defendant-cross-defendant-Appellee,

BMW OF NORTH AMERICA, INC.,
Defendant-Appellee,

CHRIS MOTORS CORPORATION,
Defendant-cross-claimant.

Appeals from the United States District Court
for the Northern District of Georgia

Before HATCHETT, Chief Judge, TJOFLAT and KRAVITCH, Circuit Judges.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and were taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by this Court that the orders of the said District Court appealed from in these causes be and the same are hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

Entered: November 21, 1996
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 2/12/97

EXHIBIT 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-9501
96-8025

LINDA DAGI,

Plaintiff-Appellant,

versus

BAYERISCHE MOTOREN WERKE, A.G.,
BMW OF NORTH AMERICA, INC.,
CHRIS MOTORS CORPORATION,

Defendants-Appellees.

[stamp—Filed, U.S. Court of Appeals, Eleventh Circuit,
JAN 22 1996, Miguel J. Cortez, Clerk]

On Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19___, _____ F.2d _____)

Before: HATCHETT, Chief Judge, TJOFLAT and KRAVITCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular service on the Court

having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5). the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE

EXHIBIT 4

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 95-9501 and 96-8025

LINDA DAGI,
Plaintiff-Appellant,

versus

BAYERISCHE NOTOREN WERKE, A.G.,
Defendant-Cross-Defendant, Appellee,

BMW OF NORTH AMERICA, INC.,
Defendant,

CHRIS MOTORS CORPORATION,
Defendant-Cross-Claimant-Appellee.

[stamp—Filed, U.S. Court of Appeals, Eleventh Circuit,
FEB 11 1997, Miguel J. Cortez, Clerk]

Appeal from the United States District Court for the
Northern District of Georgia

ORDER

(X) The Motion of LINDA DAGI for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of LINDA DAGI for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including APRIL 22, 1997, the stay to continue in force until the final disposition of the case by the Supreme Court,

provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for the further stay of the issuance of the mandate is DENIED.

/s/ Joseph W. Hatchett
CHIEF JUDGE

EXHIBIT 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-9501

LINDA DAGI,
Plaintiff-Appellant,

versus

BAYERISCHE MOTOREN WERKE, A.G.,
Defendant-Cross-Defendant-Appellee,

BMW OF NORTH AMERICA, INC.,
Defendant,

CHRIS MOTORS CORPORATION,
Defendant-Cross-Claimant-Appellee.

[stamp—Filed, U.S. Court of Appeals, Eleventh Circuit,
FEB 11 1997, Miguel J. Cortez, Clerk]

No. 96-8025

LINDA DAGI,
Plaintiff-Appellant,

versus

BAYERISCHE MOTOREN WERKE, A.G.,
Defendant-Cross-Defendant-Appellee,

BMW OF NORTH AMERICA, INC.,
Defendant-Appellee,

CHRIS MOTORS CORPORATION,
Defendant-Cross-Claimant.

Appeal from the United States District Court for the Northern District of Georgia

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ORDER

Appellant's motion for correction of clerical error is DENIED. This court's 2/11/97 order denied Appellant's motion to stay this court's mandate pending resolution of her petition for a writ of *certiorari*.

Appellant's motions to recall this court's mandate and to stay this court's mandate are DENIED AS MOOT.

/s/ Joseph W. Hatchett
CHIEF JUDGE

EXHIBIT 6

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

CIVIL ACTION
FILE NO. 93VS70409-F

LINDA DAGI,

Plaintiff,

v.

BMW OF NORTH AMERICA, INC.
and CHRIS MOTORS CORPORATION,

Defendants.

ORDER

The above-styled case is before the Court on Plaintiff's Motion for Leave to Amend Plaintiff's Complaint to Add Bayerische Motoren Werke, A.G. as a Party Defendant. No response to the motion was filed by Defendants.

Having considered the matter, Plaintiff's motion is GRANTED. IT IS HEREBY ORDERED that Bayerische Motoren Werke, A.G. be made a degendant in this action and that the summons and amended complaint br served upon said party.

SO ORDERED, this 13th day of July, 1993.

/s/ Melvin K. Westmoreland
MELVIN K. WESTMORELAND, JUDGE
STATE COURT OF FULTON COUNTY

[stamp—Filed (illegible), 14 July 93, (illegible), Deputy Clerk]

EXHIBIT 7

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NO. 1:94-cv-2135A-JEC

LINDA DAGI

Plaintiff,

vs.

BAYERISCHE MOTOREN WERKE, A.G. ET AL.

Defendant.

ORDER

The above entitled action is presently before the Court on Plaintiff's Motion To Remand [5] and defendant's brief in opposition [7].

IT IS HEREBY ORDERED that Plaintiff's Motion To Remand [5] is DENIED.

SO ORDERED, this 24th day of OCTOBER, 1994.

/s/ Julie E. Carnes
JULIE E. CARNES
UNITED STATES DISTRICT JUDGE

[stamp—Filed in Chambers, 10/24/94, Luther D. Thomas, Clerk,
By: /s/ L. Bates, Deputy Clerk]

[stamp—Entered on Docket, OCT 25 1994,
L.D.T., Clerk, By Deputy Clerk]

EXHIBIT 8

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL NO. 1:94-cv-2135-JEC

LINDA DAGI,

Plaintiff,

vs.

BAYERISCHE MOTOREN WERKE, A.G.;
BMW OF NORTH AMERICA, INC.;
and
CHRIS MOTORS CORPORATION,

Defendants.

[stamp—Filed in Chambers, 7/31/95, Luther D. Thomas, Clerk,
By: /s/ L. Bates, Deputy Clerk]

ORDER

This case is presently before the Court on defendant Chris Motors Corporation's ("Chris Motors") Motion for Summary Judgment [27-1], plaintiff's Motion to Strike Johnson Affidavit [35-1] and plaintiff's Motion to Strike Sweeney Affidavit [36-1]. The Court has reviewed the record and the arguments of the parties and, for the reasons set out below, concludes that Chris Motors' Motion for Summary Judgment should be granted and that plaintiff's motions to strike should be granted in part and denied in part.

BACKGROUND

This case was originally filed in the State Court of Fulton County, Georgia, on March 19, 1993. The case arises out of an automobile accident in which plaintiff drove her recently purchased BMW 535i into another motorist. It was raining at the time of the accident and the plaintiff was cited for following too closely by the police officer who responded to the scene. Thereafter, plaintiff's insurer settled with the person plaintiff drove into and plaintiff initiated this lawsuit on her own behalf.[1]

Plaintiff asserts claims for property damage arising from alleged defects in the design and manufacture of her BMW, as well as claims for alleged common law fraud and statutory odometer fraud. Plaintiff asserts no claim for any personal injury arising from the accident. The pleadings reveal that the only damage plaintiff suffered as a result of the accident was damage to her car. Subsequent to the accident, plaintiff declined to accept payment from her insurer intended to repair the damage to her car caused by th accident. The subject car has not been repaired and is being stored by the plaintiff.[2]

Plaintiff has amended her Complaint on three separate occasions. On the most recent occasion, plaintiff amended her Complaint to state a federal odometer fraud claim against defendant Chris Motors in Count V. Immediately upon the most recent amendment, defendants removed the case to this Court on August 12, 1994. The Complaint further alleges claims for negligent inspection, negligent failure to warn and negligent maintenance of the vehicle in

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[1] Interestingly, plaintiff's insurer chose not to subrogate any claim plaintiff may have had against these defendants and pursue it on her behalf.

[2] Plaintiff apparently does not require the use of the vehicle, as she has use of at least four other luxury automobiles.

Count III and common law fraud with respect to allegedly fraudulent misrepresentations of the true mileage on the car at the time of the purchase in Count IV.

DISCUSSION

I. Introduction

Defendant Chris Motors has moved the Court for summary judgment with respect to all of plaintiff's claims against it. Specifically, Chris Motors asserts that there is a complete lack of evidence to support any of plaintiff's claims with respect to this defendant. In response, plaintiff makes a variety of arguments in her attempt to avoid summary judgment. In making these arguments, plaintiff appears to attempt to assert new claims or new bases for her original claims.[3] Upon complete review of the record and the arguments of the parties, the Court concludes that defendant Chris Motors' Motion for Summary Judgment should be granted.

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[3] Specifically, plaintiff appears to assert a claim for negligent misrepresentations plaintiff now asserts were made prior to her purchase of the car in question. This is plaintiff's first mention of any such claim. The Complaint contains no such allegations. Accordingly, the Court will disregard any such arguments, as they are irrelevant to the claims plaintiff has stated in her Complaint. Also for the first time in her response, plaintiff alleges a host of allegedly fraudulent misrepresentations that were made prior to her purchase of her car. None of these alleged misrepresentations are mentioned in the fraud count of the Complaint. In fact, the only misrepresentation mentioned in the Complaint has to do with an alleged misrepresentation regarding the mileage on the car at the time of the purchase. In light of the Federal Rules' requirement that fraud be pled with particularly, FED. R. CIV. P. 9(b), the Court concludes that none of these newly alleged misrepresentations are relevant to the lone fraud allegation before the Court and, thus, will not be considered.

II. The Summary Judgment Standard.

Summary judgment is not properly viewed as a device that the trial court may, in its discretion, implement in lieu of a trial on the merits. Instead, Rule 56 of the Federal Rules of Civil Procedure *mandates* the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of *every* element essential to that party's case on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). In such a situation, there can be no genuine issue as to any material fact, as a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Id.* at 322-23.

The movant bears the initial responsibility of asserting the basis for his motion. *Id.* at 323; *Apcoa, Inc. v. Fidelity Nat'l Bank,* 906 F.2d 610, 611 (11th Cir. 1990). However, the movant is not required to negate his opponent's claim. The movant may discharge his burden by merely " 'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the non-moving party's case." *Celotex,* 477 U.S. at 325. After the movant has carried his burden, the non-moving party is then required to "go beyond the pleadings"and present competent evidence[4] designating "'specific facts showing that there is a genuine issue for trial.' " *Id.* at 324 (quoting FED. R. CIV. P. 56 (e)). While the court is to view all evidence and factual inferences in a light most favorable to the non-moving party, *Samples v. City of Atlanta,* 846 F.d 1328, 1330 (11th Cir. 1988), "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the require-ment is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 274-48 (1986).

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[4] The non-moving party may meet its burden through affidavit and deposition testimony, answers to interrogatories, and the like. *Celotex,* 477 U.S. at 324.

A fact is material when it is identified as such by the controlling substantive law. *Id.* at 248. An issue is genuine when the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Id.* at 249-50. The nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986) (citations omitted). An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or is "not significantly probative." *Anderson,* 477 U.S. at 249-50. Thus, to survive a motion for summary judgment, the non-moving party must come forward with specific evidence of *every* element material to that party's case so as to create a genuine issue for trial.

III. The Negligence Claim.

In her Complaint, the plaintiff alleges that defendant Chris Motors was negligent in its inspection of the car due to the failure to discover the car's defective condition, in its failure to warn her of the car's defective and dangerous condition and in its maintenance of the car while in its possession. In its Motion for Summary Judgment, Chris Motors makes a three-pronged attack on plaintiff's negligence claim. First, Chris Motors argues that plaintiff has failed to adduce any evidence that the car is in fact defective or improperly maintained.[5] Chris Motors further argues that it was under no duty to inspect the vehicle to discover any latent defect that may have existed. Lastly, Chris Motors argues that plaintiff's negligence claim is absolutely barred by Georgia's

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[5] Plaintiff has not directed the Court's attention to any evidence suggesting that Chris Motors failed to exercise due care in the maintenance of the car in question, other than the alleged failure to discover the alleged "defects" in the car.

economic loss rule.[6] Each of defendant's alternative grounds for summary judgment on this count of the Complaint are discussed below.

A. Lack of evidence with respect to product defect.

Chris Motor's primary argument in support of its Motion for Summary Judgment is that plaintiff has failed to direct the Court's attention to any "defect" in the car at the time of the accident. As defendant's argument goes, it cannot be liable for a defect that does not exist, even if it was negligent in its inspection and maintenance of the car. As defendant notes, the negligence claim itself is premised upon the existence of a defective and dangerous condition that defendant failed to discover and warn plaintiff about.

Although plaintiff's Complaint makes no reference to any specific dangerous condition Chris Motors failed to discover and warn about, she now argues that there are three such "defects" in the car. Plaintiff alleges defects with respect to the brakes, the throttle housing unit and the floormats in the car at issue. Defendant Chris Motors asserts that plaintiff has failed to adduce any evidence in support of her claims of dangerous defects in her car. Upon complete review of the record and the arguments of the parties, the Court has serious doubts that plaintiff has created any issue of fact with respect to the existence of any defect in this car.

First, with respect to no plaintiff's claims about defects in the brakes, there is not one scintilla of evidence to support her claims. The car was examined by two persons highly familiar with the subject model following the accident, Jim Blair who is a BMW Regional Technical Specialist with

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[6] As the Court concludes that Chris Motors is entitled to Summary Judgment because it had no duty to inspect the subject vehicle for latent defects, it need not reach defendant's arguments with respect to Georgia's economic loss rule.

twenty-two years of automotive training and experience and Stanley Zangel who was the service department manager at Chris Motors. Mr. Blair examined plaintiff's car in July of 1992 and Mr. Zangel examined plaintiff's car in August of 1993. Neither inspection rendered any indication of any defect with respect to the breaking system of plaintiff's car. In fact, Blair's inspection and testing of plaintiff's car indicated that it performed up to specifications, even in its unrepaired state. Plaintiff's uncorroborated belief that the brakes did not work properly and, thus, caused her accident simply does not create a dispute of material fact with respect to any defect in her car's braking system. *See Blackson v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480, 1482 (11th Cir. 1985).[7]

Plaintiff fares even worse with respect to her claims of a defect in the throttle housing unit. In her responsive brief, plaintiff asserts that her car was the subject of a recall notice for problems in the throttle housing unit and that she was not notified of this recall. Plaintiff refers the Court to the deposition of Ed Wagner, Chris Motors' shop foreman, in support of this allegation. Contrary to plaintiff's assertions, the cited testimony does not support her allegation. In his deposition, Wagner testified that one or possibly two *other* models of 1991 BMW's were recalled for problems with the throttle housing unit but expressively testified that her car was not one of the model's recalled.[8] Accordingly, there is no evidence, not even plaintiff's suspicion, indicating any defect in the car's throttle housing unit.

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[7] "All reasonable inferences arising from the undisputed facts should be made in favor of the nonmovant, but an inference based on speculation and conjecture is not reasonable." *Blackston*, 764 F.2d at 1482 (citations omitted).

[8] Plaintiff inaccurately recites the facts when she states that Ed. Wagner "testified that there was a recall for the throttle housing unit on

With respect to the floor mats, plaintiff directs the Court's attention to testimony by James Blair which indicates that the floor mats in her car were not BMW-supplied accessories. (Blair Dep. at 54-65.) Apparently, the floor mats in plaintiff's car were supplied to Chris Motors, who installed the mats, by some other after-market vendor.[9] In his testimony, Blair indicates that BMW floormats would have anchoring eyelets to secure the mats to the floor, thus, preventing them from shifting around due to movement of a driver's feet. (*Id.*) Blair indicates that the floor mats in plaintiff's car lack these anchoring eyelets and then opines that such a lack of anchoring eyelets could result in the floormats shifting around such that the driver's floor mat might impede the proper operation of the accelerator, brake and/or clutch pedals. (*Id.*) Blair further testifies, however, that he does not know what position the driver's floor mat was in at the time of the accident.

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the 1991 BMW 535 model . . . . '' (Pl.'s Resp. to Mot. for Summ. J. at 19.) The exact testimony is as follows:

> Q Now, on these model vehicles, have you been aware of any kind of recall or campaign involving the throttle housing unit?
>
> A This is a 535, '91 535. I don't believe there has [sic] been recalls on the '91 535 throttle housing.
>
> Q Now, has there been a recall on the throttle housing unit of similar designed or other models of the '91 BMWs?
>
> A I believe there has been one on the 525. There has [sic] been on the '91 318s for different reasons.

(Wagner Dep. at 38.)

[9] Defendant Chris Motors argues that plaintiff is barred from arguing that the floor mats are not BMW floor mats because of portions of her own testimony. Upon complete review of the subject testimony, however, the Court cannot reach the conclusion Chris Motors urges. Although plaintiff does indicate that the floor mats were BMW floor mats, taken in context, plaintiff's testimony is that she believed the floor mats to be BMW floor mats because they were installed by Chris Motors and were in the vehicle when she purchased it. (Dep. of L. Dagi at 84.)

Interestingly, plaintiff does not direct the Court's attention to any of plaintiff's testimony indicating that the floormats had any connection to the subject accident. Plaintiff directs the Court's attention to Blair's testimony regarding the floormats and then asserts that an issue of fact exists with respect to a "defect" in plaintiff's car because the floormats were not BMW-approved floormats. Significantly, plaintiff directs the Court's attention to no expert testimony or precedent supporting her theory that floormats without anchoring eyelets are "defective" or any evidence linking the floormats to the subject accident. Although, the Court has serious doubts with respect to the existence of a dispute of material fact regarding any dangerous defect in plaintiff's car at the time of the accident, it need not decide the issue because it concludes that defendant Chris Motors is entitled to summary judgment at least one of its other two alternative grounds.

B. Duty to Inspect.

Defendant Chris Motors argues that any defect that may exist in plaintiff's car is, at most, a latent defect. In fact, Chris Motors points out that plaintiff herself still cannot direct the Court's attention to any defect in the vehicle with any degree of specificity. Thus, Chris Motors argues that it is entitled to summary judgment on plaintiff's negligence claim, regardless of whether her car is "defective." *See Ryals v. Billy Poppell, Inc.*, 192 Ga. App. 787, 788, 386 S.E.2d 513 (1989). In response, plaintiff argues that "this is not like the usual case where a new car dealer has not had an opportunity to inspect a vehicle and discover defects. In this case, the subject vehicle was in the possession of Chris Motors for thirteen months." (Pl.'s Resp. to Mot. for Summ. J. at 20.)

Plaintiff's argument misses the mark. It is not whether Chris Motors had the "opportunity" to inspect the car to

locate latent defects that governs the Court's determination. Rather, it is whether Chris Motors had any *duty* to inspect in the first instance. *Billy Poppell,* 192 Ga. App. at 788. The law in Georgia is clear and longstanding on the duty issue:

> "[I]t is the general rule that a vendor or dealer who is not the manufacturer *is under no obligation to test an article purchased and sold by him for the purpose of discovering latent or concealed defects,* but that when he purchases and sells an article in common and general use, in the usual course of trade, without knowledge of its dangerous quality, and with nothing tending reasonably to call his attention thereto, he is not negligent in failing to exercise care to determine whether it is dangerous or not. In such a case, he may assume that the manufacturer has done his duty in properly constructing the article and in not placing upon the market a commodity which is defective and likely to inflict injury."

Harison-Gulley Chevrolet, Inc. v. Carr, 134 Ga. App. 449, 452, 214 S.E.2d 712 (1975) (emphasis added) (quoting *King Hardware Co. v. Ennis,* 39 Ga. App. 355, 360 (1928)). Thus, absent an indication that Chris Motors was on notice of some patent safety defect in the car, plaintiff's negligence claim fails as a matter of law. As plaintiff has not directed the Court's attention to any evidence indicating any such patent defect existed in her car during the time it was in Chris Motors' possession, the Court concludes that it should grant defendant Chris Motors' Motion for Summary Judgment with respect to plaintiff's negligence claim.[10]

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[10] Interestingly, plaintiff drove the car for approximately six weeks and two thousand miles prior to the accident and she failed to discover any such "defect" in the car. Given the undisputed record in this case, there can be little argument that Chris Motors failed to discover and warn plaintiff of some patent dangerous condition in the car.

IV. The State Law Fraud Claim.

In its Motion for Summary Judgment, defendant Chris Motors argues that plaintiff has failed to produce any evidence to support her fraud claim. Additionally, Chris Motors argues that plaintiff's state law fraud claim is barred because she failed to repudiate the underlying contract after learning of the alleged fraud. *See Owens v. Union City Chrysler-Plymouth, Inc.*, 210 Ga. App. 378, 379, 436 S.E.2d 94 (1993). Upon complete review of the record and the arguments of the parties, the Court concludes that Chris Motors' Motion for Summary Judgment should be granted due to plaintiff's failure to rescind the contract that governed the purchase of plaintiff's car. Thus, the Court need not reach any of the issues raised with respect to the allegedly fraudulent representation about the car's mileage.

The undisputed record before the Court indicates that the purchase contract plaintiff signed when she purchased her car from Chris Motors contained a merger clause providing that "this Agreement cancels and supersedes any prior Agreement and as the date hereof comprises the complete and exclusive statement of the terms of the Agreement relating to the subject matters covered hereby. *The Agreement cannot be modified except by express written Agreement of the parties.*" (Def. Chris Motors' Mot. for Summ. J. at Ex. A, p. 1 (emphasis added).) "Accordingly, unless [plaintiff] effectively rescinded the sales contract by promptly returning or offering to return the used automobile [11] she purchased from [Chris Motors] after discovering the alleged fraud, she has no viable claim for the alleged misrepresenta-

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[11] The car plaintiff purchased in this case was a demonstrator with approximately 5,300 miles showing on the odometer. Additionally, the car was sold "AS IS" with an express disclaimer of any warranties by the dealer. (Def. Chris Motors' Mot. for Summ. J. at Ex. B.)

tion." *Owens,* 210 Ga. App. at 379. "The presence of a merger clause in the underlying contract is determinative if the defrauded party has not rescinded but has elected to affirm the contract." *Id.* (quoting *Nexus Services v. Manning Tronics,* 201 Ga. App. 255, 410 S.E.2d 810 (1991)).

The undisputed facts in this case establish that plaintiff never made any attempt to rescind the contract and return the car to Chris Motors. Rather, plaintiff continues to retain ownership of the vehicle these many months after learning of the allegedly fraudulent representations regarding the mileage on the car at the time of the purchase. Accordingly, the Court concludes that it should grant defendant Chris Motors' Motion for Summary Judgment with respect to plaintiff's state law fraud claim.

V. The Federal Odometer Fraud Claim.

Plaintiff's Complaint states a claim for alleged violations of the Federal Odometer Fraud Act, 49 U.S.C. §§ 32701-32711.[12] "To recover under the Act, one must show a violation of the Act, coupled with an intent to defraud while committing the violation." *Shore v. J. C. Phillips Motor Co.,* 567 F.2d 1364, 1365 (5th Cir. 1978).[13] All that is required to establish a violation, "is that a change in the odometer reading has occurred and that the seller has failed

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[12] In her Complaint, plaintiff refers to 15 U.S.C. §§ 1981-1988 as the place that the Odometer Fraud Act is codified. The Act was previously codified at 15 U.S.C. §§ 1981-1991. Prior to plaintiff's amendment that added this claim, however, the Act was renumbered and the Act is currently codified at 49 U.S.C. ¶¶ 32701-32711.

[13] In *Bonner v. City of Pritchard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all of the decisions of the former Fifth Circuit Court of Appeals handed down prior to the close of business on September 30, 1981.

to disclose the change."[14] *Delay v. Hearn Ford,* 373 F. Supp. 791, 796 (D.S.C. 1974). An intent to defraud cannot be presumed but may be inferred from proof of a violation "in the absence of an explanation of the odometer change." *Bryant v. Thomas,* 461 F. Supp. 613, 616-17 (D. Neb. 1978) (quoting *Delay,* 373 F. Supp. at 796).

In its Motion for Summary Judgment, Chris Motors argues that plaintiff has failed to adduce any evidence to support her odometer fraud claim.[15] Specifically, Chris Motors argues that plaintiff cannot direct the Court's attention to any direct or probative circumstantial evidence to support her claim. In response, plaintiff appears to concede that there is no direct evidentiary support for her claim and then argues that the record does contain probative circumstantial evidence of odometer tampering. Specifically, plaintiff directs the Court's attention to various testimony indicating that the car's odometer can be disabled by removing a fuse and that two of the tires on plaintiff's car showed excessive wear at the time of the accident. Upon complete review of the record and the arguments of the parties, the Court concludes that it should grant defendant Chris Motors' Motion for Summary Judgment.

Plaintiff's reliance on evidence indicating the ability of a dealer to disable an odometer is misplaced. Such evidence would exist with respect to any automobile sold by any dealer. Plaintiff emphasizes, however, that the design of her

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[14] Driving a vehicle while the odometer is disconnected constitutes a "change" in the reading that is prohibited by the Act. 49 U.S.C. § 32703(2).

[15] Chris Motors also argues that plaintiff's claim is barred by the applicable statute of limitations for such claims. The Court need not decide this sticky procedural issue, however, as it concludes that defendant is entitled to judgment on the merits.

car's odometer made it easy for the odometer to be disabled.[16] Specifically, plaintiff appears to argue that this odometer was so easy to disable that an inference necessarily arises that it was in fact disabled.

Plaintiff's arguments in this regard are problematic for a number of reasons. First, the undisputed testimony by those who examined the car indicates that there is no evidence of any tampering with the memory chip that stores the car's mileage. (Zangel Dep. at 82; Blair Dep. at 109.) Further, there is no evidence to suggest that *any* Chris Motors employee ever disabled *any* odometer, much less plaintiff's. (Zangel Dep. at 109; Sweeney Aff. at ¶ 8[17]; Mihyar Dep. at 61; J. Christman Dep. at 49-50; N. Christman Dep. at 39-40.) In the face of the uniform sworn denials of every person familiar with the vehicle and policies of Chris Motors, plaintiff cannot rest upon the ease with which the odometer *could* be disabled.

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[16] The odometer in plaintiff's car is electronic, rather than mechanical. Thus, the odometer display is blank when power is not supplied to the instrument cluster. Although, it is not entirely clear from the testimony, it appears that the odometer can be disabled simply by removing a fuse in the fuse box. The same fuse that powers the odometer also powers all the other instruments in the dash of the car. In support of the odometer fraud claim, plaintiff theorizes that some unidentified person at Chris Motors disabled this fuse and then drove the car some undetermined number of miles without any idea of their rate of speed, their distance traveled or the level of fuel in the tank.

[17] Plaintiff has moved to "strike" portions of the Sweeney Affidavit. Although procedurally incorrect, plaintiff essentially objects to the admissibility of portions of his testimony. Plaintiff objects to Sweeney's testimony to the extent he reports that he experienced no problems with the operation of the car during the period that he drove it. Contrary to plaintiff's arguments, as the primary operator of the car for more than 5,000 miles, Sweeney's testimony regarding his own observations are perfectly proper. Plaintiff makes a similar objection to Sweeney's testi-

Plaintiff's evidence with respect to tire wear is also problematic.[18] At the outset, plaintiff's arguments with respect to the level of tire wear presume that any excessive wear indicated at the time of her accident necessarily indicates excessive wear at the time she took delivery of the car. Plaintiff totally ignores the fact that she and her husband drove the vehicle for approximately six weeks and two thousand miles *after* the purchase. Additionally, the defense witness testimony upon which plaintiff relies does not warrant denial of Chris Motors' meritorious Motion for Summary Judgment.

Plaintiff relies, in part, on the testimony of witnesses who are affiliated with Chris Motors or BMW NA. Specifically, plaintiff directs the Court's attention to testimony by Stanley Zangel, the service manager at Chris Motors, and John DeMartini, a manager in the Customer Relations Department

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mony regarding his inspection of the car prior to delivery to plaintiff. Here again, plaintiff's objection is without merit. Sweeney may properly testify with respect to his personal observations of the condition of the car at the time of delivery. Plaintiff further objects to Sweeney's testimony to the effect that neither he nor any other Chris Motors employee has ever tampered with the odometer in plaintiff's car. To the extent that Sweeney's statement is based on hearsay rather than his personal observations and knowledge of his own conduct, plaintiff's objection is sustained. Thus, the challenged testimony will not be considered to the extent it purports to describe events of which Sweeney has no personal knowledge. Accordingly, plaintiff's Motion to Strike Sweeney Affidavit is granted in part and denied in part.

[18] In opposing Chris Motors' Motion for Summary Judgment, plaintiff relies, in part, on the testimony of a tire expert she retained, William Hudson. For the reasons stated in the Court's order regarding plaintiff's refusal to seasonably identify her expert witnesses, the Court will disregard Hudson's affidavit testimony. Additionally, the Court notes, that Hudson's testimony addresses the condition of the tires *after the accident*.

for BMW NA. Plaintiff cites the portions of these witnesses testimony which, if read in isolation, appear to support her claim of odometer fraud. Plaintiff, however, ignores other portions of these witnesses' testimony that is less favorable, as well as the testimony of others that is adverse to her claim.

Plaintiff directs the Court's attention to testimony by Stanley Zangel that indicates that the rear tires on plaintiff's car exhibit excessive wear for tires with only 7,100 miles on them. (Zangel Dep. at 82.) Plaintiff also cites other testimony indicating that the tire wear on the rear tires was approaching the "wear indicators", thus, indicating that the tires would need to be replaced in the near future. (*Id.*) According to other testimony from Mr. Zangel, tires of the type on plaintiff's car should last "between 16 to 22,000 miles", under normal driving conditions. (*Id.* at 83.) Plaintiff completely disregards other portions of Zangel's testimony, however, indicating that the tires on plaintiff's car had worn substantially more in the center, indicating that the tires had been driven while over-inflated. (*Id.* at 82-83.)[19] Moreover, Zangel testified that two of plaintiff's tires "had good tread left on it [sic], I believe it was 332, which is

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[19] Zangel's testimony with respect to the amount of wear on the rear tires is as follows:

> Q Which two [tires] had more wear?
>
> A The tires — I believe they were the tires on the rear.
>
> Q How much was the wear on the tires in the rear?
>
> A The tires on the rear were almost to the wear indicator in the center of the tire.
>
> Q When it's almost to the wear indicator, what does that tell you?
>
> A That it's almost due for replacement. And also, the wear was in the center of the tire, indicating an over inflation. If you were to over inflate your tires, they wear in the center.

(Zangel Dep. at 82-83.)

almost like a new tire, would indicate that this car was probably driven very hard with the tires on the back. I.e., [sic] wheel spinning and stuff like that.'' (*Id.* at 83-84.)[20]

The only testimony before the Court regarding the condition of the tires when plaintiff bought the car indicates that the tires did not show excessive wear prior to the car being delivered to plaintiff. Plaintiff and her husband both testified that they did not notice any excessive wear on the tires or anything else that would indicate the car had been driven more than 5,300 miles at the time of the purchase. (L. Dagi Dep. at 35-36; F. Dagi Dep. at 45-46.)[21] The sales manager who had been the primary driver of the car prior to plaintiff's purchase likewise testified that he inspected the vehicle immediately before it was delivered and noted no unusual wear on the tires or any other aspect of the car. (Sweeny Aff. at ¶ 10.) More importantly, the service technician who serviced the car a few days before it was delivered to plaintiff testified that he noted no excessive wear on the tires at

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[20] The testimony uniformly indicates that the sports type tires on plaintiff's car are especially susceptible to excessive wear when driven aggressively. (Zangel Dep. at 84; Blair Dep. at 97-98; DeMartini Dep. at 62-65.)

[21] According to plaintiff's and her husband's own testimony, they did not notice anything out of the ordinary when they test drove the vehicle or when it was delivered. This is so, even though plaintiff and her husband test drove the vehicle more than once and even took it home over night so that they could look it over prior to the decision to buy it. The pieces of testimony plaintiff now seeks to rely upon indicate that the rear tires were quite noticably worn at the time of the accident. This combination of facts leads to an argument fraught with inconsistency. The theory plaintiff advances in this litigation is that the tires must have been almost worn out at the time she purchased the car, yet she never explains her failure to discover this fact during her, and her husband's, extensive examination of the car prior to deciding to buy it.

the time he worked on the car. (Johnson Aff. at ¶¶ 5-7.)[22] This testimony by the only person to visually inspect the tires at close range stands completely unrefuted in the record.[23]

Plaintiff's citations to the record indicate no more than that the tires on her car exhibited excessive wear on the date of the accident. The record is silent with respect to any such excessive wear on the day she took delivery of the car. In fact, the only evidence before the Court indicates that there

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[22] As with the Sweeney Affidavit, plaintiff has moved to "strike" portions of the Johnson Affidavit. Plaintiff's motion will be treated as evidentiary objections. Plaintiff objects to Johnson's testimony regarding his inspection of plaintiff's tires when he worked on plaintiff's car and his knowledge of Chris Motors' custom and practice with respect to the discovery of safety hazards. The Court concludes that plaintiff's objections to this testimony are without merit. As the person who actually worked on plaintiff's tires, Johnson may testify to his observations about those tires. Further, as an employee of Chris Motors, Johnson may testify as to his understanding of his employer's custom and practice with respect to handling potential safety hazards, such as excessively or abnormally worn tires. Plaintiff further objects to Johnson's testimony to the effect that Chris Motors had only received two recall notices with respect to the 535i model, neither of which involved the brakes or throttle housing unit. To the extent Johnson's testimony purports to speak for Chris Motors, rather than himself, the Court will sustain plaintiff's objection. Defendant laid no foundation for Johnson to testify with respect to what Chris Motors did or did not receive. Accordingly, plaintiff's Motion to Strike Johnson Affidavit is granted in part and denied in part.

[23] Significantly, Johnson balanced and rotated the tires as part of the pre-delivery service he performed on the car. At the time he performed the service, he inspected the tires for "abnormal wear or other safety concerns." (Johnson Aff. at ¶ 6.) He further testified that "[i]f the tires had reflected abnormal or excessive wear, I, as a matter of custom and practice, would not have gone forward with the rotation and balance procedure." (*Id.*)

was no indication of excessive wear on the day of delivery. Further, the record contains testimony to the effect that aggressive driving, improper inflation and improper alignment could all contribute to substantially accelerated wearing of the type of tires installed on plaintiff's car. Moreover, there is no indication in the record that any agent of Chris Motors has *ever* tampered with any odometer, let alone the odometer in plaintiff's car.

Plaintiff essentially asks this Court to submit this case to a jury on suspicion and innuendo, when there is no real dispute with respect to any material fact. Such a result is neither required nor permitted by the law. Accordingly, the Court concludes that defendant Chris Motors is entitled to summary judgment with respect to plaintiff's federal odometer fraud claim.

CONCLUSION

For the foregoing reasons, defendant Chris Motors Corporation's Motion for Summary Judgment [27-1] is GRANTED, plaintiff's Motion to Strike Johnson Affidavit [35-1] is GRANTED in part and DENIED in part and plaintiff's Motion to Strike Sweeney Affidavit [36-1] is GRANTED in part and DENIED in part.

SO ORDERED, this 31 day of July, 1995.

/s/ Julie E. Carnes
JULIE E. CARNES
UNITED STATES DISTRICT JUDGE

EXHIBIT 9

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL NO. 1:94-cv-2135-JEC

LINDA DAGI,

Plaintiff,

vs.

BAYERISCHE MOTOREN WERKE, A.G.;
BMW OF NORTH AMERICA, INC.;
and
CHRIS MOTORS CORPORATION,

Defendants.

[stamp—Copies served By Courtroom Deputy]

[stamp—Filed in Chambers, 7/31/95, Luther D. Thomas, Clerk,
By: /s/ L. Bates, Deputy Clerk]

ORDER

This case is presently before the Court on plaintiff's Motion to Compel [16-1], plaintiff's Motion to Extend Discovery [18-1], defendant Chris Motors Corporation's ("Chris Motors") Motion to Preclude Witness Testimony [20-1], defendants Bayerische Motoren Werke, A.G.'s ("BMW AG") and BMW of North America, Inc.'s ("BMW NA") Motion to Extend Time to File Motion for Summary Judgment [23-1], defendants BMW AG's and BMW NA's Motion to Preclude Plaintiff's Expert Witness Testimony [24-1] and defendant BMW AG's Motion for

Protective Order [26-1]. The Court has reviewed the record and the arguments of the parties and, for the reasons set out below, concludes that plaintiff's Motion to Compel should be denied without prejudice, that plaintiff's Motion to Extend Discovery should be denied, that defendant BMW AG's Motion for Protective Order should be granted and that defendants' motions to preclude expert witness testimony should be granted.

BACKGROUND

This case was originally filed in the State Court of Fulton County, Georgia, on March 19, 1993. The case arises out of an automobile accident in which plaintiff drove her recently purchased BMW 535i into another motorist. It was raining at the time of the accident and plaintiff was cited for following too closely by the police officer who responded to the scene. Thereafter, plaintiff's insurer settled with the person plaintiff drove into and plaintiff initiated this lawsuit on her own behalf.[1]

Plaintiff asserts claims for property damage arising from alleged defects in the design and manufacture of her BMW, as well as claims for alleged common law fraud and statutory odometer fraud. Plaintiff asserts no claim for any personal injury arising from the accident. The pleadings reveal that the only damage plaintiff suffered as a result of the accident was damage to her car. Subsequent to the accident, plaintiff declined to accept payment from her insurer intended to repair the damage to her car caused by the accident. The subject car has not been repaired and is being stored by plaintiff.[2]

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[1] Plaintiff's insurer chose not to subrogate any claim plaintiff may have had against these defendants and pursue it on her behalf.

[2] Plaintiff apparently does not require the use of the vehicle, as she has use of at least four other luxury automobiles.

Plaintiff has amended her Complaint on three separate occasions. On the most recent occasion, plaintiff amended her Complaint to state a federal odometer fraud claim. Immediately upon the most recent amendment, defendants removed the case to this Court on August 12, 1994. Pursuant to the local rules, the Court established that discovery would expire on January 12, 1995, in an order issued on September 15, 1994.

Due to the various amendments to the Complaint, the addition of parties and the removal of this case to federal court, the discovery period in this case lasted almost two years. During that time, plaintiff has conducted extensive discovery in this case.[3] Notwithstanding the foregoing chronology, plaintiff's counsel identified three expert witnesses they assert support plaintiff's case *and* moved for an additional ninety (90) days of discovery *after 4:00 p.m.*[4] *on January 12, 1995, the day that discovery was set to expire.*[5]

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[3] According to defendant Chris Motors, plaintiff has propounded two sets of interrogatories (totalling 35 in number), six sets of requests for production of documents (totalling 46), and eleven requests for admissions. Additionally, plaintiff's counsel has requested "literally dozens" of supplements to responses. (Def. Chris Motor's Resp. in Opp'n to Pl.'s Mot. to Extend Disc. at p.4.) In response to these discovery requests, "the Defendants have furnished documents, diagrams, schematics, and photographs sufficient to comprise more than one hundred twenty (120) deposition exhibits." (*Id.*) Plaintiff has further "explored" each document produced in "more than six hundred (600) pages of deposition testimony, taken from eight (8) witnesses." (*Id.*) Plaintiff does not dispute any of defendant Chris motors' depiction of the discovery conducted thus far.

[4] Defendant Chris Motors asserts, and plaintiff has not disputed, that it received a facsimile transmission of plaintiff's first identification of expert witnesses and motion to extend discovery at approximately 4:20 p.m. on January 20, 1995.

[5] Additionally, plaintiff moved to compel responses to various discovery requests from defendant BMW AG on the eve of the expiration of discovery, January 11, 1995.

DISCUSSION

I. Motions to Compel and for Protective Order.

Plaintiff has moved to compel the production of a variety of highly technical documents from defendant BMW AG. Defendant BMW AG objected to the requests to produce at the time they were propounded in the summer of 1994 and continues to resist producing them to this date. Defendant BMW AG asserts that the documents sought in the motion to compel are overly broad, harassing and outside the scope of any reasonable discovery in this case. BMW AG has, however, consented to producing the documents at issue and has agreed to waive its objections to producing same upon entry of what it considers to be a reasonable protective order. Plaintiff resists entry of the protective order suggested by BMW AG and argues that a less restrictive protective order be entered in its place. Upon complete review of the record and the arguments of the parties, the Court concludes that defendant BMW AG's Motion for Protective Order should be granted and that plaintiff's Motion to Compel should be denied, without prejudice, at this time.[6]

The parties have agreed to all of the terms of a proposed protective order but one. Specifically, the parties cannot agree on the level of confidentiality plaintiff must maintain with respect to certain engineering and manufacturing specifications, documents and drawings. Plaintiff seeks the entry

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[6] Upon receipt of this order, the parties are directed to make good faith efforts to resolve their differences with respect to any remaining dispute over the production of documents sought in plaintiff's Motion to Compel. Should the parties fail to resolve any remaining issues, plaintiff may renew her motion to compel, but only with respect to documents sought in the original motion that are not provided by BMW AG. Plaintiff will have thirty (30) days from the date of this order to renew any such motion. NO EXTENSION TO THE TIME FOR FILING ANY RENEWED MOTION TO COMPEL WILL BE GRANTED.

of a limited protective order that would allow plaintiff's counsel to freely share the documents with other plaintiffs, and their counsel, who might have some other claim against BMW AG. BMW AG seeks entry of a more restrictive protective order requiring that plaintiff only disclose the information to those working on her case[7] and that she return all such documents upon termination of this litigation.

Plaintiff asserts that the entry of BMW AG's proposed protective order would run counter to the general rule that all discovery be conducted in the open. Plaintiff further argues that her counsel should have the right to share any information gathered with any and all persons who may sue BMW now or in the future. In support of entry of the order, BMW AG argues that plaintiff's discovery requests seek disclosure of highly proprietary engineering and manufacturing information not readily available to anyone outside BMW. BMW AG further argues that protection of such highly proprietary information is appropriate, especially given the expansive nature of the discovery requests at issue.

Plaintiff's main objection to the entry of the proposed protective order is that entry of the order would impede her ability to share the documents with persons unrelated to this litigation.[8] Plaintiff opines that entry of the proposed order

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[7] Entry of this order would require all persons who receive access to the documents to sign an agreement acknowledging the terms of the protective order.

[8] The Court notes that all the present litigation with respect to plaintiff's Motion to Compel and BMW AG's motion for protective order could have been avoided by entry of a consent protective order. Rather than agreeing to the confidentiality BMW sought with respect to admittedly proprietary information, plaintiff's counsel pursued a strategy that may have been inconsistent with their client's best interest. The expressed desire of plaintiff's counsel to share these documents with other

would place the burden of proof on plaintiff to show that any given document is not properly the subject of a confidentiality order, should she desire to share such information with others.[9] Contrary to plaintiff's assertions, the proposed protective order expressly provides that it is BMW AG who has "[t]he burden of proving that a Protected Document contains confidential technical information", if plaintiff challenges BMW AG's designation of a document as such.[10] (Proposed Protective Order at ¶ 2.) Accordingly, the Court concludes that BMW AG's Motion for Protective Order should be granted and the Court will issue the proposed protective order concurrently with this order.

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plaintiffs and their counsel appears to have outweighed the desire to litigate *this case* on the merits in an expeditious manner. BMW AG has articulated legitimate business concerns it seeks to serve by protecting the confidentiality of its proprietary information through the entry of the proposed protective order. What is not clear is what interest is served on plaintiff's part by insisting that plaintiff's counsel have the right to freely share such information among other current or potential plaintiffs and their counsel.

[9] Plaintiff argues that only information amounting to trade secrets is properly protected by a restrictive protective order such as the one proposed by BMW AG. While BMW AG does not dispute plaintiff's assertions, it makes common sense arguments that much of the proprietary information sought by plaintiff is properly the subject of such an order. Specifically, the documents sought to be protected are engineering and manufacturing specifications, drawings and associated documents that are not available to persons outside of BMW.

[10] Although the proposed protective order anticipates that plaintiff may challenge BMW AG's designation of documents as "Protected Documents", the Court will not tolerate unnecessary satellite litigation regarding such documents. The parties are again urged to resolve any differences they may have on this issue *without further intervention by the Court*. The parties are hereby on notice that monetary sanctions against counsel and parties may issue upon a finding of fault with respect to unnecessary wrangling over the confidentiality of the documents produced subject to the protective order.

II. Motion to Extend Discovery.

Plaintiff has moved the Court to extend discovery in this case for an additional ninety (90) days. In so moving, plaintiff recognizes the difficulty she faces in light of the Court's September 15, 1994, scheduling order [6] which states in pertinent part that:

> . . . this case in on a four month discovery track. Accordingly, discovery expires on THURSDAY, JANUARY 12, 1995. No extension of this date will be granted except in exceptional cases where the circumstances on which the request is based did not exist or could not have been anticipated by counsel at the time the preliminary statement was filed. See LR 225-1(b).

Plaintiff's motion comes after almost two years of exhaustive discovery in a case arising out of an automobile accident in which there were no physical injuries to any person.[11]

Additionally, plaintiff's assertions that the discovery dispute between herself and BMW AG constitutes a circumstance that justifies extending discovery are unpersuasive. As the undisputed record indicates, plaintiff had propounded the discovery at issue, defendant BMW AG had provided the challenged responses and plaintiff had threatened a motion to compel *prior* to the case even being removed to this court. In light of these facts, plaintiff cannot seriously argue that her discovery dispute with BMW AG constitutes a circumstance that could not have been anticipated at the time of the filing of the preliminary statement and proposed scheduling order. Accordingly, the Court concludes that plaintiff's Motion to Extend Discovery should be denied.

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[11] As noted *supra*, while driving in the rain, plaintiff rearended the car in front of her and received a citation for following too closely.

III. Defendants' Motions to Preclude Expert Witnesses.

All defendants have moved the Court to preclude plaintiff from using any testimony offered by three expert witnesses, who were first identified by plaintiff at approximately 4:20 p.m. on the final day of a discovery period that had lasted almost two years.[12] Defendants object to any testimony by these three experts because plaintiff failed to identify them at any time prior to the final hours of an extremely long discovery period. Defendants' principal argument for exclusion of expert testimony by these witnesses is that, without the opportunity to retain their own experts to rebut plaintiffs' expert testimony, defendants would be prejudiced by the admission of this testimony. Defendants further argue that any reopening of discovery to relieve the prejudice caused by plaintiff's late identification of these witnesses would further delay the final resolution of this already old case, as well as dramatically drive up the cost of defending the case.

Plaintiff argues that exclusion of her expert is not warranted in this case and is not permissible under applicable binding precedent. *See Murphy v. Magnolia Elec. Power Ass'n,* 639 F.2d 232, 235 (5th Cir. 1981).[13] Plaintiff further argues that any neglect in timely identification of experts is harmless and excusable in light of the discovery dispute between plaintiff and BMW AG. Contrary to plaintiff's arguments, the Court concludes that exclusion of her ex-

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[12] Plaintiff identified William Hudson of Detroit, Michigan as a tire expert, Rick Matysiak of Atlanta, Georgia as an odometer expert and Steve Syson of Santa Barbara, California as an automotive engineering expert.

[13] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all of the decisions of the former Fifth Circuit Court of Appeals handed down prior to the close of business on September 30, 1981.

pert's testimony is very nearly compelled by the applicable federal rules and the cited authorities.[14] Moreover, plaintiff's arguments fly directly in the face of the Local Rules of this Court, which are quite explicit in their requirement that experts be designated *early* in the discovery process:

> (c) Expert Witnesses. Any party who desires to use the testimony of an expert witness shall designate the expert sufficiently early in the discovery period to permit the opposing party the opportunity to depose the expert and, if desired, to name its own expert witness sufficiently in advance of the close of discovery so that a similar discovery deposition of the second expert might also be conducted prior to the close of discovery.
>
> *Any party who does not comply with the provisions of the foregoing paragraph shall not be permitted to offer the testimony of the party's expert, unless expressly authorized by Court order based upon a showing that the failure to comply was justified.*

LR 225-1(c), NDGa. (Emphasis added).

Pursuant to the express provisions of Rule 26 of the Federal Rules of Civil Procedure, all litigants are obligated to respond to, and seasonably update responses to, discovery requests regarding anticipated expert witness testimony. As an enforcement mechanism, the Federal Rules permit district courts to exclude testimony of any witnesses whose identities are not seasonably identified. FED. R. CIV. P. 37(c) (1).[15]

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[14] As defendants have noted in their briefs, much of the cited authority is either not on point with respect to the position plaintiff is now taking or is hostile to her position.

[15] Additionally, Rule 16(f) provides that a trial court may exclude proffered evidence or testimony as a sanction for a party's failure to comply with a scheduling or pretrial order. This rule comes into play in this case because plaintiff, through her actions, seeks to avoid the effects

"Among the factors which the court should take into consideration in determining whether to exclude evidence are 'the explanation, if any, for the failure to name the witness, the importance of the testimony of the witness, the need for time to prepare to meet the testimony, and the possibility of a continuance.'" *Murphy*, 639 F.2d at 235 (quoting 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2050 at 327 (1970)). Plaintiff makes a variety of arguments in her attempt to bring her clearly inappropriate discovery tactics within the range of acceptable litigation conduct. Upon complete review of the record and the arguments of the parties, the Court is unpersuaded by plaintiff's varied and inconsistent arguments.

Plaintiff first argues that her dispute with BMW AG over requested discovery materials constitutes a sufficient reason and explanation for her failure to seasonably identify her expert witnesses. Plaintiff essentially argues that she did not know the proper response to the defendants' interrogatories regarding expert witnesses due to her lack of access to the technical information sought from BMW AG. As defendants have pointed out, however, plaintiff had no more information available to her on the day she did identify her experts than she had previously because BMW AG has yet to turn over the documents in question.[16] Additionally, defendant

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of the Court's scheduling order that established January 12, 1995, as the last day of discovery. By springing these expert witnesses out of nowhere in the final hour of almost two years of discovery, plaintiff, in effect, seeks to unilaterally extend the discovery period even further in order to cure her own dilatory conduct of failing to timely disclose her experts. If rules governing the conduct of discovery are to have any teeth, such conduct cannot be tolerated.

[16] Also, the description of plaintiff's experts' testimony indicates that it is based upon their examination of plaintiff's car, as well as their general familiarity with the make and model in question. The undisputed

Chris Motors had provided plaintiff with information similar to that requested from BMW AG in its responses to plaintiff's discovery requests.[17] Moreover, testimony by plaintiff and her husband at their depositions, in August and November of 1994 respectively, makes it clear that plaintiffs had retained experts long before they were disclosed and were unwilling to reveal any information regarding these experts.[18] Rather than truthfully respond to defendants' proper interrogatories and deposition questions seeking information about expert witnesses, plaintiff consistently maintained that she had no such witnesses.

Plaintiff next argues that these experts' testimony is too important to her case for the Court to exclude their testimony. In essence, plaintiff argues that exclusion of these witnesses' testimony is too harsh a sanction. Plaintiff's assertions with regard to the importance of these expert witnesses to her case are belied by her own conduct during this litigation. As defendants have noted, this litigation had been

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record establishes that plaintiff has had custody and control of the car since the time of the accident giving rise to this litigation. Accordingly, it is not at all clear what relationship, if any, defendant BMW AG's dispute with plaintiff over discovery responses has to plaintiff's failure to timely identify expert witnesses whose anticipated testimony does not appear to be related to the material sought from BMW AG.

[17] Specifically, defendant Chris Motors refers to over one hundred (120) such documents, as well as the extensive deposition testimony regarding such documents. Chris Motors had also agreed to make the shop manual for plaintiff's car available for reproduction, but plaintiff declined to take advantage of the offer due to the expense of copying the manual.

[18] At their depositions, plaintiff and her husband referred to "investigations" with respect to plaintiff's claims conducted on her behalf by her attorney. When asked to reveal expert witness information, however, plaintiff and her husband, upon instruction from counsel, refused to answer.

going on for almost two years, during which plaintiff had repeated declined to identify any expert witnesses, when plaintiff suddenly identified expert witnesses who she now asserts are "crucial" to her case. While expert testimony is obviously important to proving a product liability claim, plaintiff's neglect in identifying any such witnesses until the final few minutes of an exceedingly lengthy discovery period is sharply inconsistent with her present assertion that the testimony is "crucial" to proving her case; that is, where were these "crucial" witnesses during the first two years of this case?

Plaintiff also argues that defendants will have adequate time to prepare to meet the testimony of these experts and that any prejudice to defendants by the late identification can be cured by a reopening of discovery. Plaintiff's arguments in this respect disregard the fact that plaintiff has failed to provide any legitimate justification to reopen discovery other than her own dilatory conduct. Plaintiff's arguments also ignore the prejudice that would inure to defendants by reopening discovery in a case that is already more than two years old and in which a motion for summary judgment has already been filed by defendant Chris Motors. As defendants have noted, reopening discovery to depose these witnesses, two of whom reside in distant locations, would be costly, time consuming, and could lead to the need for defendants to retain their own experts and incur the expense of securing their opinions and testimony.

Additionally, plaintiff's arguments ignore the effect her conduct in this litigation would have on this Court's ability to maintain its own schedule. As noted previously, plaintiff, in effect, seeks to unilaterally reopen discovery due to her own dilatory conduct. Plaintiff now argues that she should be rewarded for her improper tactics by the reopening of discovery in a case that has already had almost two years of discovery. It would be inappropriate to sanction such con-

duct. Accordingly, the Court concludes that defendants' motions to preclude testimony by plaintiff's expert witnesses should be granted. The Court will not admit any evidence proffered by plaintiff with respect to these witnesses.

CONCLUSION

For the foregoing reasons, plaintiff's Motion to Compel [16-1] is DENIED without prejudice to being refiled within thirty (30) days of this order, plaintiff's Motion to Extend Discovery is DENIED [18-1], defendant Chris Motors' Motion to Preclude Witness Testimony [20-1] is GRANTED, defendants BMW AG's and BMW NA's Motion to Extend Time to File Motion for Summary Judgment [23-1] is GRANTED, defendants BMW AG's and BMW NA's Motion to Preclude Plaintiff's Expert Witness Testimony [24-1] is GRANTED and defendant BMW AG's Motion for Protective Order [26-1] is GRANTED.

It is further ordered that plaintiff and defendant BMW AG endeavor in earnest to resolve any remaining issues with respect to the production of documents referenced in plaintiff's Motion to Compel. Defendants BMW AG and BMW NA must file any motion for summary judgment they intend to file within twenty (20) days of this order.

SO ORDERED, this 31 day of July, 1995.

/s/ Julie E. Carnes
JULIE E. CARNES
UNITED STATES DISTRICT JUDGE

EXHIBIT 10

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1:94-CV-2135-JEC

LINDA DAGI,

Plaintiff

vs.

BAYERISCHE MOTOREN WERKE, A.G.,
BMW OF NORTH AMERICA, INC.
and CHRIS MOTORS CORPORATION,

Defendants

[stamp—Copies served By Courtroom Deputy]

[stamp—Filed in Chambers, 7/31/95, Luther D. Thomas, Clerk,
By: /s/ L. Bates, Deputy Clerk]

PROTECTIVE ORDER

In order to preserve and maintain the confidentiality of certain documents to be produced by BMW of North America, Inc. and Bayerische Werke, A.G. (''Defendants'') in this action, it is ordered that:

1.

Documents to be produced by BMW of North America, Inc. and Bayerische Werke, A.G. (''Defendants'') to Plaintiff, Linda Dagi, during discovery in this litigation which contain confidential technical information shall hereafter be referred to as ''Protected Documents.'' When used in this

Order, the word "documents" means all written material, video tapes and all other tangible items. Except as otherwise indicated below, documents designated by Defendants as "Confidential" that are produced or delivered by Defendants to Plaintiff or her attorneys, consultants, agents or experts in this action shall be Protected Documents and given confidential treatment as described below.

2.

The burden of proving that a Protected Document contains confidential technical information is on said Defendants. Prior to designating any material as "Confidential," Defendants must make a bona fide determination that the material is, in fact, a trade secret or other confidential information, the dissemination of which would significantly damage Defendants' competitive position. If Plaintiff disagrees with the "confidential" designation of any document, Plaintiff will so notify Defendants in writing. Said Defendants will timely apply to the Court to set a hearing for the purpose of establishing that said document is confidential. Plaintiff will consider any document so marked as confidential while said Defendants seek the Court's protection on the disputed documents.

3.

Both the Protected Documents and the information contained therein shall be treated as confidential. Except upon the prior written consent of said Defendants or upon further order of this Court, the Protected Documents or information contained therein may be shown, disseminated, or disclosed only to the following persons:

(a) Plaintiff's counsel of record int his case, including other members of counsel's law firm and any other counsel associated to assist in the preparation or trial of this case;

(b) Employees of Plaintiff's counsel or of associated counsel, who assist in the preparation or trial of this case;

(c) Experts and consultants retained by the Plaintiff for the preparation or trial of this case, provided that no disclosure shall be made to any expert or consultant who is employed by a competitor of the Defendants; and

(d) The Court, the Court's staff, witnesses, and the jury in this case.

4.

Before receiving access to any of the Protected Documents of the information contained therein, each person described in Paragraph 3(c) above shall be advised of the terms of this Order, shall be given a copy of this Order, and shall agree in writing, in the form attached hereto as Exhibit "A," to be bound by its terms and to submit to the jurisdiction of the Court.

5.

Plaintiff's counsel shall be required to return the Protected Documents after the conclusion of this case.

6.

To the extent that Protected Documents or information contained therein is used in the taking of depositions, such documents or information shall remain subject to the provisions of this Order.

7.

Any confidential or Protected Document filed with the Clerk before any trial of this matter shall be filed under seal. This Protective Order shall not apply to the disclosure of Protected Documents or the information contained therein at the time of trial, through the receipt of Protected Documents into evidence or through the testimony of witnesses. The

closure of trial proceedings and sealing of the record of a trial involve considerations not presently before the Court. These issues may be taken up as a separate matter upon the motion of any of the parties at the threshold of the trial. The Protected Documents and information shall remain subject to the terms of the Protective Order if the material is declared by the Court to be admissible as evidence at trial.

8.

Affidavits produced by said Defendants (for in-camera inspection by this Court) in support of a showing of confidentiality or in support of a response to a Motion to Compel Discovery are found not to constitute a waiver by said Defendants of its claim of attorney-client and/or work product privilege as to the underlying documents.

9.

This Order shall be binding upon the parties hereto, upon their attorneys, and upon the parties' and their attorneys' successors, executors, person representatives, administrators, heirs, legal representatives, assignees, subsidiaries, divisions, employees, agents, independent contractors, or other persons or organizations over which they have control.

IT IS SO ORDERED this 31 day of July, 1995.

/s/ Julie E. Carnes
Julie Carnes, Judge, United States
District Court, Northern District,
Atlanta Division

"Exhibit A"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1:94-CV-2135-JEC

LINDA DAGI,

Plaintiff

vs.

BAYERISCHE MOTOREN WERKE, A.G.,
BMW OF NORTH AMERICA, INC.
and CHRIS MOTORS CORPORATION,

Defendants

AFFIDAVIT OF_____

Personally appeared before the undersigning officer, duly authorized by law to administer oaths, _____, who, being duly sworn, deposes and says that the within statements are true and correct:

1.

I hereby agree that I have read the Protective Order attached hereto and that I understand its terms and meanings.

2.

I further agree that my signature below submits me to the jurisdiction of this Court and binds me to the provisions of this Protective Order.

FURTHER AFFIANT SAYETH NOT.

_____

Sworn to and subscribed before me, this
_____ day of _____, 1995.

_____
Notary Public
My Commission Expires:

EXHIBIT 11

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL NO. 1:94-cv-2135-JEC

Linda Dagi

Plaintiffs,

vs.

Bayerische Motoren Werke et al

Defendants.

JUDGMENT

This action having come before the court, Honorable Julie E. Carnes, United States District Judge, for consideration of defendant Chris Motor Corporation motion for summary judgment, and the court having granted motion, it is

Ordered and Adjudged that the plaintiff, Linda Dagi, take nothing, that the action be dismissed, and that the defendant, Chris Motors Corporation, recover from the plaintiff the costs of this action.

Dated at Atlanta, Georgia, this 2nd day of November, 1995.

Luther D. Thomas, Clerk

By: /s/ Dail S. Howard
Dail S. Howard
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
November 2, 1995

By: /s/ D. Howard
D. Howard
Deputy Clerk

EXHIBIT 12

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL NO. 1:94-CV-2135-JEC

LINDA DAGI

Plaintiff,

v.

BAYERISCHE MOTOREN WERKE, A.G.;
BMW OF NORTH AMERICA, INC.;
and
CHRIS MOTORS CORPORATION,

Defendants.

[stamp—Filed in Chambers, 11/9/95, Luther D. Thomas, Clerk,
By: /s/ L. Bates, Deputy Clerk]

ORDER

This case is presently before the Court on plaintiff Linda Dagi's Motion for Order Requiring Substitution of English Language Documents for German Language Documents [66].

At 4:00 p.m. on August 28, 1995, defendant Bayerische Motoren Werke, A.G. (hereinafter "BMW AG") produced to plaintiff 741 pages of drawings, specifications, and documents, 735 of which were written in German. (Aff. of Thomas Allan Rice at 2.) The following day, counsel for plaintiff asked counsel for defendant BMW AG whether there were any English versions of the documents. (*Id.* at 2-

3.) Counsel for defendant's answer was nonresponsive. (*Id.* at 3.) On September 8, 1995, plaintiff therefore filed this motion requesting that defendants substitute English documents, if any exist, for the German documents. Defendant's response, filed September 19, 1995, denied the existence of any English versions of these documents, noting further that plaintiff's vehicle was not manufactured in the United States. (Def.'s Resp. [70] at 1.) Defendant's response, however, failed to attach any affidavits, or other competent evidence, supporting these assertions.

In her reply, plaintiff argues that this assertion in the brief has no probative value and cannot be considered as evidence. *See Lynch v. Georgia Power Co.*, 180 Ga. App. 178, 348 S.E. 2d 719 (1986) (holding that brief in support of motion for summary judgment is not proper evidence upon which summary judgment can be granted). As defendant's assertions are contained solely within its brief and are not supported by any evidence, the Court will permit defendants to file a supplemental pleading on this issue. This pleading should contain the assertion of the lack of English versions in the proper form, namely an affidavit or declaration. Accordingly, the Court orders defendant to file this pleading with the Court within three (3) days of the filing of this order.

SO ORDERED, this 9 day of November, 1995.

/s/ Julie E. Carnes
JULIE E. CARNES
UNITED STATES DISTRICT JUDGE

EXHIBIT 13

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL NO. 1:94-CV-2135-JEC

LINDA DAGI,

Plaintiff,

vs.

BAYERISCHE MOTOREN WERKE, A.G.;
BMW OF NORTH AMERICA, INC.;
and
CHRIS MOTORS CORPORATION,

Defendants

[stamp—Filed in Chambers, 11/22/95, Luther D. Thomas, Clerk,
By: /s/ L. Bates, Deputy Clerk]

This case is presently before the Court on plaintiff's Motion for Order Requiring Substitution of English Language Documents for German Language Documents [66].

At 4:00 p.m. on August 28, 1995, defendant BMW AG produced to plaintiff 741 pages of drawings, specifications, and documents, 735 of which were written in German. (Aff. of Thomas Allan Rice at 2.) The following day, counsel for plaintiff asked counsel for defendant BMW AG whether there were any English versions of the documents. (Id. at 2-3.) Counsel for defendant's answer was nonresponsive. (Id. at 3.) On September 8, 1995, plaintiff therefore filed this motion requesting that defendants substitute English documents, if any exist, for the German documents.

Defendants response, filed September 19, 1995, denied the existence of any English versions of these documents, noting further that plaintiff's vehicle was not manufactured in the United States. (Def.'s Resp. [70] at 1.) Defendant's response, however, failed to attach any affidavits, or other competent evidence, supporting these assertions.

On November 9, 1995, the Court ordered defendants to file a supplemental pleading on this issue [78]. As directed by the Court's Order, defendants submitted a supplemental response to plaintiff's motion [81], which included the affidavits of Dr. Jost J. Schmitt and Mr. David Cordero. Mr. Cordero, an attorney for BMW NA, states in his affidavit that BMW NA is "not in possession of any English translations of any of the German language documents produced on August 28, 1995." (Aff. of Cordero at 2.) Dr. Schmitt, an attorney for BMW AG, states that "BMW AG is in possession of English translations of fifteen (15) documents produced in the original format and language on August 28, 1995." (Aff. of Schmitt at 1.)

To the extent that BMW AG is in possession of any English translations of the requested documents which have not yet been produced to plaintiff, the Court orders defendant BMW AG to produce the documents to plaintiff within ten (10) days of the filing of this order.

SO ORDERED, this 22 day of November, 1995.

/s/ Julie E. Carnes
JULIE E. CARNES
UNITED STATES DISTRICT JUDGE

EXHIBIT 14

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL NO. 1:94-CV-2135-JEC

LINDA DAGI,

Plaintiff,

v.

BAYERISCHE MOTOREN WERKE, A.G.;
BMW OF NORTH AMERICA, INC.;
and
CHRIS MOTORS CORPORATION,

Defendants

[stamp—Copies served By Courtroom Deputy]

[stamp—Filed in Chambers, 11/30/95, Luther D. Thomas, Clerk,
By: /s/ L. Bates, Deputy Clerk]

ORDER

This case is presently before the Court on plaintiff Linda Dagi's (hereinafter "plaintiff") Motion for Leave to Amend Her Complaint to Conform to the Evidence [65], defendants Bayerische Motoren Werke, A.G. (hereinafter "BMW AG") and BMW of North America, Inc.'s (hereinafter "BMW NA") Motion for Summary Judgment [61], and defendants' Motion to Strike Portions of the Second Affidavits of Linda Dagi and T. Forcht Dagi [68]. The Court has reviewed the record and the arguments of the parties and, for the reasons set out below, concludes that plaintiff's

Motion for Leave to Amend should be denied, that defendants' Motion for Summary Judgment should be granted, and that defendants' Motion to Strike should be granted in part and denied in part.

BACKGROUND[1]

This case was originally filed in the State Court of Fulton County, Georgia, on March 19, 1993. The case arises out of an automobile accident in which plaintiff drove her recently purchased BMW 535i into another motorist. It was raining at the time of the accident and plaintiff was cited for following too closely by the police officer who responded to the scene. Thereafter, plaintiff's insurer settled with the person plaintiff drove into and plaintiff initiated this lawsuit on her own behalf.[2]

Plaintiff asserts claims for property damage arising from alleged defects in the design and manufacture of her BMW, as well as claims for alleged common law fraud and statutory odometer fraud. Plaintiff asserts no claim for any personal injury arising from the accident. The pleadings reveal that the only damage plaintiff suffered as a result of the accident was damage to her car. Subsequent to the accident, plaintiff declined to accept payment from her insurer intended to repair the damage to her car caused by the accident. The subject car has not been repaired and is being stored by plaintiff.[3]

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[1] This section is nearly identical to the background section found in the Court's Order on defendant Chris Motors' Motion for Summary Judgment, filed on July 31, 1995.

[2] Plaintiff's insurer chose not to subrogate any claim plaintiff may have had against these defendants and pursue it on her behalf.

[3] Plaintiff does not require the use of the vehicle, as she has use of at least four other luxury automobiles.

Plaintiff has amended her Complaint on three separate occasions. On the most recent occasion, plaintiff amended her Complaint to state a federal odometer fraud claim against defendant Chris Motors Corporation (hereinafter "Chris Motors") in Count V. Immediately upon the most recent amendment, defendants removed the case to this Court on August 12, 1994. The Complaint further alleges claims for negligent inspection, negligent failure to warn and negligent maintenance of the vehicle in Count III and common law fraud with respect to allegedly fraudulent misrepresentations of the true mileage on the car at the time of the purchase in Count IV.

The discovery period ended January 12, 1995.

On July 31, 1995, the Court granted defendant Chris Motors' Motion for Summary Judgment. The remaining defendants, BMW AG and BMW NA, moved for summary judgment on August 16, 1995. On September 8, 1995, plaintiff moved the Court to amend her complaint for the fourth time.

DISCUSSION

I. Motion to Amend Complaint

Plaintiff wishes to amend Count II of her Third Amended Complaint by replacing her claim for strict liability against BMW NA with a negligence-based claim for failure to warn of alleged manufacture and design defects in her automobile. Plaintiff also wishes to add a new Count VI which alleges deceit in failing to disclose that her automobile had been damaged by acid rain and subsequently repainted.

The Federal Rules of Civil Procedure provide that leave to amend a complaint should be "freely given when justice so requires." FED. R. CIV. P. 15(a). "Courts have interpreted [amendment] provisions liberally, in line with the

Federal Rules' overall goal of resolving disputes, insofar as possible, on the merits and in a single judicial proceeding." *Spartan Grain & Mill Co. v. Ayers,* 517 F.2d 214, 220 (5th Cir. 1975).[4] Leave to amend, however, is "by no means automatic." *Addington v. Farmer's Elevator Mut. Ins. Co.,* 650 F.2d 663, 666 (5th Cir. 1981), *cert. denied,* 454 U.S. 1098 (1981). Instead, the decision to grant or deny the motion lies within the "sound discretion of the trial court." [5] *Id.*

In determining whether the Court should grant leave to amend, it may consider such factors as (1) undue delay, bad faith, or dilatory motive on the part of the movant, (2) repeated failure to cure deficiencies by amendments previously allowed, (3) undue prejudice to the opposing party by virtue of allowance of the amendment, and (4) futility of the

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[4] In *Bonner v. City of Pritchard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all of the decisions of the former Fifth Circuit Court of Appeals handed down prior to the close of business on September 30, 1981.

[5] Plaintiff cites *Dussouy v. Gulf Coast Inv. Corp.,* 660 F.2d 594 (5th Cir. 1981), for the proposition that the "policy of Rule 15(a) . . . circumscribes the exercise of the [Court's] discretion . . . ." (Pl.'s. Mot. to Amend [65] at 1). This, however, is an inaccurate presentation of this case. In *Dussouy,* the Fifth Circuit criticized the trial court's failure to provide any explanation for denying plaintiff's motion to amend, and stated that in the absence of any such explanation, the reasons for the denial must be "readily apparent" to withstand challenge. *Dussouy,* 660 F.2d at 597. *See also, Rhodes v. Amarillo Hosp. Dist.,* 654 F.2d 1148, 1153-1154 (5th Cir. 1981) (holding that district court's denial of plaintiff's motion for leave to file amended complaint without stated reasons is "unfortunate but not fatal to affirmance," and record provided ample grounds for denying motion). Therefore, the policy of Rule 15(a) does not circumscribe a trial court's discretion to deny a motion to amend. Instead, case law interpreting this provision has stated a preference that a trial court give an adequate explanation in denying a motion to amend.

amendment. *Nolin v. Douglas County,* 903 F.2d 1546, 1550 (11th Cir. 1990); *Foman v. Davis,* 371 U.S. 178, 182 (1962). The Eleventh Circuit has determined that evidence of all four factors need not be shown to deny a motion for leave to amend a complaint. *See Paschal v. Florida Pub. Employees Relations Comm'n,* 666 F.2d 1381, 1384 (11th Cir. 1982) (holding that evidence of unjustified delay and prejudice to defense is sufficient to justify lower court's ruling, despite lack of evidence of bad faith or dilatory motive). The Court finds several such reasons that justify denial of plaintiff's motion.

First, plaintiff's motion to amend appears to be a dilatory attempt to unduly delay an already lengthy and tedious litigation and, thus, appears to be made in bad faith. It is true that the mere passage of time, in and of itself, would not be enough to satisfy the requirement of undue delay. *Dussouy v. Gulf Coast Inv. Corp.,* 660 F.2d 594, 598 (5th Cir. 1981). Instead, the delay must be shown to be "undue" to deny amendment. *Id.* The Court concludes that the delay is undue.

This case commenced on March 19, 1993, roughly two-and-a-half years prior to plaintiff's filing of this motion. Since then, plaintiff has amended her complaint no less than three times. Plaintiff's initial Complaint, filed in the State Court of Fulton County on March 19, 1993, alleged four counts against defendants BMW NA and Chris Motors. Count I of the Complaint stated a claim for strict liability against BMW NA, alleging manufacture and design defects in plaintiff's automobile. The Complaint further alleged claims against Chris Motors for negligent inspection, negligent failure to warn and negligent maintenance of the vehicle in Count II and common law fraud in connection with allegedly fraudulent misrepresentations of the true mileage on the car at the time of the purchase in Count III. Count IV averred entitlement to punitive damages against

Chris Motors based on its allegedly fraudulent conduct. Plaintiff's First Amended Complaint added a third defendant, BMW AG, and asserted against it a claim of strict liability. While plaintiff prayed for punitive damages at the conclusion of her First Amended Complaint, she dropped Count IV of her initial Complaint.[6] Plaintiff's Third Amended Complaint stated a claim for federal odometer fraud in Count V.

Plaintiff's claim that her motion is an attempt to amend her complaint "to conform to the evidence in this case" is untenable. The discovery period concluded nearly one year ago and plaintiff has been cognizant of the facts which gave rise to this motion during this time. Still, she has neglected to amend her complaint until the zero hour of this proceeding. At best, her conduct demonstrates a lack of diligence; at worst, it shows bad faith.

Such dilatory conduct also causes the burden to shift to the movant to prove that the delay was due to excusable neglect. *Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc.*, 690 F.2d 1157, 1163 (5th Cir. 1982), *reh'g denied*, 697 F.2d 1092 (1983), *and cert. denied*, 464 U.S. 814 (1983). Here, plaintiff offers no excuse as to her untimeliness in filing her motion. Plaintiff merely states that she desires to amend her complaint to conform to the evidence in the case—evidence that she has been aware of for over eight months prior to filing this motion.

Furthermore, the timing of plaintiff's fourth motion to amend appears pretextual as well. Plaintiff's motion asks the Court to drop her strict liability allegations against defendant BMW NA and allege negligence-based claims against defendant for failure to warn of alleged defects and/or alleged

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[6] The Court can discern no difference between plaintiff's First Amended Complaint and Second Amended Complaint.

defective design[7] as well as a separate count entitled "Deceit." Plaintiff chose to file this motion on September 8, 1995, after the Court granted defendant Chris Motors' motion for summary judgment on July 31, 1995 and the two remaining defendants followed suit by filing for summary judgment on August 16, 1995. That plaintiff now seeks to amend her complaint is rather disingenuous and appears to be nothing more than a thinly-veiled effort to elude an adverse summary judgment ruling as to the remaining defendants. This dilatory maneuvering justifies the Court's denial of plaintiff's motion to amend her pleading.

Additionally, allowing an amendment at such an advanced stage of the case would undermine all notions of judicial economy and would prejudice defendants. A Court should not allow an amendment when the non-moving party would be prejudiced in the sense that it would be put to added expense or subject to the burden of a more complicated or lengthy trial. *Stone Mountain Game Ranch, Inc. v. Hunt,* 570 F.Supp. 238, 241 (N.D. Ga. 1983), *aff'd,* 746 F.2d 761 (11th Cir. 1984). In this case, plaintiff merely seeks to recast her allegations in a manner that would hopefully keep her sinking claims afloat for the time being and avoid summary judgment. Plaintiff does not aver the existence of any newly-discovered evidence that would provide support for the new claims sought in the amendment, nor does she allege circumstances which have prevented her from moving to amend her complaint until nearly one year after the close of discovery. *See Nolin,* 903 F.2d at 1551 ("Requesting an amendment at such a late stage of the proceedings and in the absence of unusual circumstances . . . frustrates any attempt at judicial economy").

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[7] The Court finds it perplexing that plaintiff would even seek leave to amend its complaint to allege negligence-based claims against defendant BMW NA. The Court disposed of these same claims against defendant Chris Motors.

Also, permitting such an amendment would require defendants to familiarize themselves with an entirely new area of Georgia law. *See Sun Bank, N.A. v. E.F. Hutton & Co.*, 926 F.2d 1030 (11th Cir. 1991) (stating that amendment, filed nineteen months after case began and without any justification, would require party to learn Massachusetts Statute of Frauds law and Florida's choice of law rules). Specifically, plaintiff wishes to add a claim for "deceit" against BMW NA for failing to disclose that plaintiff's automobile was damaged by acid rain and subsequently repainted. Over eight months have passed since the close of discovery, yet this is the first time plaintiff has raised allegations of acid rain damage to her vehicle. Requiring defendants to respond to a new, substantive claim at such a late stage in the litigation would be highly prejudicial, thrusting them into a situation in which they would have to become suddenly familiar with an entirely new area of the law. The Court refused to further complicate an already complicated case by placing defendants in that position.

To the extent that plaintiff has sought amendment merely to thwart defendants' well-briefed and persuasive motion, and in light of plaintiff's failure to aver any unusual circumstances which would justify an amendment, plaintiff has not earned the sympathy of the Court. Indeed, the Court's review of relevant case law highlights various instances in which parties with arguably more sympathetic and compelling claims than the instant plaintiff were denied leave to amend. In *Addington v. Farmer's Elevatory Mut. Ins. Co.*, 650 F.2d 663, 667 (5th Cir. 1981), the Fifth Circuit held that the district court did not abuse its discretion when it refused to approve an amendment filed more than a year after the case began, after the termination of discovery, and after defendant's motion for summary judgment. *Id.* As in the instant case, plaintiff filed the motion to amend prior to the district court's ruling on the summary judgment motion.

Id. at 665. The court criticized plaintiff for failing to justify his delay of more than a year in proffering the amendment, and stated that defendant would have been prejudiced by the granting of the motion. *Id.* at 667. Similarly, in *Paschal v. Florida Public Employees Relations Commission,* 666 F.2d 1381, 1384 (11th Cir. 1982), the fact that the proposed amendment was filed after the case was more than a year old and discovery had ended, and plaintiff offered no excuse for the delay, weighed against the movant. *Id.* In *Local 472, v. Georgia Power Co.,* 684 F.2d 721, 724 (11th Cir. 1982), plaintiff's motion to amend was filed two years after the action began, after completion of discovery, and after defendants had filed summary judgment motions but before the district court's ruling on those motions. The Eleventh Circuit upheld the lower court's denial of plaintiff's motion. *Id.*

Here, plaintiff filed her fourth motion to amend over two-and-a-half years after the action began, nearly one year after the close of discovery, and only after defendants had filed for summary judgment. Additionally, she failed to offer any excuse as to why the delay occurred. The Court finds that plaintiff sought leave to amend with dilatory motive to unduly delay the proceeding. Furthermore, allowing her to amend her complaint at this late stage would only serve to prejudice defendants. Accordingly, the Court denies plaintiff's motion for leave to amend her complaint.

II. Motion for Summary Judgment

In her Complaint, plaintiff alleges that defendant BMW AG should be held strictly liable for damages sustained to her vehicle due to the vehicle's various alleged manufacturing and design defects and that defendant BMW NA should be held strictly liable for failing to warn plaintiff of the vehicle's defective and dangerous condition which directly

and proximately caused her accident.[8] Plaintiff further alleges that BMW AG defectively designed the vehicle's odometer which has also caused her damage. In its Motion for Summary Judgment, defendants argue that plaintiff has failed to adduce any direct evidence that the automobile was in fact defective. Moreover, they claim that, in light of their direct expert evidence of the nonexistence of any defects and plaintiff's failure to produce any expert testimony in rebuttal, summary judgment in favor of defendants is required. Defendants further argue that BMW NA is not a manufacturer and therefore may not be held strictly liable for damages occasioned as a result of any alleged defects.

A. The Summary Judgment Standard

Summary judgment is not properly viewed as a device that the trial court may, in its discretion, implement in lieu of a trial on the merits. Instead, Rule 56 of the Federal Rules of Civil Procedure *mandates* the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of *every* element essential to that party's case on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). In such a situation, there can be no genuine issue as to any material fact, as a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Id.* at 322-23.

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[8] Plaintiff's claim against BMW NA appears to seek recovery solely for the damage to her vehicle stemming from defendant's failure to warn plaintiff of the automobile's defective condition. (Pl.'s Compl. at 8.) Her responsive brief, however, appears to assert a claim against BMW NA for failure to warn plaintiff of the defective design of the vehicle's odometer. (Pl.'s Resp. to Mot. for Summ. J. [64] at 22-23.) The Court is unclear how her vehicle's odometer directly and proximately caused plaintiff's accident. Nevertheless, as the Court finds, *infra,* that there is no evidence of the odometer's defective design, this issue is moot.

The movant bears the initial responsibility of asserting the basis for his motion. *Id.* at 323; *Apcoa, Inc. v. Fidelity Nat'l Bank,* 906 F.2d 610, 611 (11th Cir. 1990). However, the movant is not required to negate his opponent's claim. The movant may discharge his burden by merely " 'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the non-moving party's case." *Celotex,* 477 U.S. at 325. After the movant has carried his burden, the non-moving party is then required to "go beyond the pleadings" and present competent evidence[9] designating " 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 324 (quoting FED. R. CIV. P. 56(e)). While the court is to view all evidence and factual inferences in a light most favorable to the non-moving party, *Samples v. City of Atlanta,* 846 F.2d 1328, 1330 (11th Cir. 1988), "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986).

A fact is material when it is identified as such by the controlling substantive law. *Id.* at 248. An issue is genuine when the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Id.* at 249-50. The nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita Electric Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986) (citations omitted). An issue is not genuine if it is unsupported by evidence, or if it

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[9] The non-moving party may meet its burden through affidavit and deposition testimony, answers to interrogatories, and the like. *Celotex,* 477 U.S. at 324.

is created by evidence that is "merely colorable" or is "not significantly probative." *Anderson,* 477 U.S. at 249-50. Thus, to survive a motion for summary judgment, the non-moving party must come forward with specific evidence of *every* element material to that party's case so as to create a genuine issue for trial.

B. Lack of Direct Evidence of Manufacturing Defects

Plaintiff's strict liability claims are based in large part on her belief that various defects in her automobile caused her damages, and that defendant BMW NA failed to warn plaintiff of the defects. Defendants assert however, and the record confirms, that throughout the roughly two-and-a-half years of litigating this action, plaintiff has failed to adduce any competent evidence of any defect in the manufacture of her vehicle. In a product liability action involving strict liability claims, it is essential that plaintiff prove the product was "not merchantable and reasonably suited to the use intended." OCGA § 51-1-11(b)(1). This means that plaintiff must show that the manufacturer's product was defective when sold to plaintiff. *Center Chemical Co. v. Parzini,* 234 Ga. 868, 869, 218 S.E. 2d 580 (1975). In a strict liability claim, the existence of a defect is "crucial," as a manufacturer is not an insurer against all risks associated with the product. *Giordano v. Ford Motor Co.,* 165 Ga. App. 644, 299 S.E.2d 897 (1983). Plaintiff has failed to carry this burden.

Although plaintiff's Complaint makes no reference to any specific defects which ultimately caused damage to her vehicle, she now argues that there are three such defects. Plaintiff alleges defects with respect to the brakes, the throttle housing unit and the floormats in the car at issue.[10]

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[10] Defendants have moved to "strike" portions of plaintiff's second affidavit. Defendants essentially object to the admissibility of portions of

Defendants assert that plaintiff has failed to adduce any evidence in support of her claims of dangerous defects in her car. Upon complete review of the record, the arguments of the parties, and the relevant and abundant case law, the Court finds that plaintiff has failed to create any issue of fact with respect to the existence of any defect in this car.

First, with respect to plaintiff's claims about defects in the brakes, plaintiff does not support her claim with evidence. Plaintiff admits that neither she nor her husband experienced brake problems with this vehicle prior to the collision. (Dagi depo. at 44, 47.) Following the accident, the car was examined by two persons highly familiar with the subject model: Jim Blair who is a BMW Regional Technical Specialist with twenty-two years of automotive training and experience and Stanley Zangel who was the service department manager at Chris Motors. (Blair depo. at 39-42, 106.) Mr. Blair examined plaintiff's car in July of 1992 and Mr. Zangel examined plaintiff's car in August of 1993. Neither inspection rendered any indication of any defect with respect to the vehi-

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her testimony. Specifically, defendants object to plaintiff's testimony to the extent she states that she was unable to stop her car "because of defects in the mechanical system of said vehicle." (Dagi Aff. at ¶ 10.) To the extent plaintiff's testimony addresses details of the accident within her own personal knowledge, defendants' motion is denied. For example, plaintiff was aware of the road's wet surface as well as her inability to stop her vehicle on the wet road. Accordingly, her testimony as to such details is proper. To the extent plaintiff's testimony is based on matters which are beyond the realm of her experience and requires special skill and knowledge, however, defendants' objection is sustained. The Court will therefore disregard plaintiff's opinion as to whether the vehicle was "defective" as she introduced no concrete facts to substantiate her knowledge or familiarity with her vehicle's mechanical system. *See, e.g. Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 848 (10th Cir. 1979) (holding that lower court properly excluded plaintiff's testimony that in plaintiff's opinion pressure cooker was defectively designed).

cle's braking system. In fact, Blair's inspection indicated that the vehicle performed up to specifications, even in its state of disrepair. (Blair depo. at 51-53.) Plaintiff's uncorroborated belief that the brakes did not work properly, thus causing her accident, simply does not create a dispute of material fact with respect to any defect in her car's braking system. *See Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480, 1482 (11th Cir. 1986).[11]

Likewise, plaintiff's claims of a defect in the throttle housing unit are unsupported by evidence. In her responsive brief, plaintiff asserts that her car was the subject of a recall notice for problems in the throttle housing unit and that she was not notified of this recall. Plaintiff refers the Court to the deposition of Ed Wager, Chris Motors' shop foreman, in support of this allegation. (Pl.'s Resp. to Mot. for Summ. J. [64] at 17.) Contrary to plaintiff's assertions, the cited testimony does not support her allegation. In his deposition, Wagner testified that one or possibly two other models of 1991 BMW's were recalled for problems with the throttle housing unit but expressly testified that her car was not one of the models recalled.[12] Accordingly, there is no evidence indicating any defect in the car's throttle housing unit.

With respect to the floormats, plaintiff directs the Court's attention to testimony by James Blair which indicates that the floormats in her car were not BMW-supplied accessories. (Blair Dep. at 58) In his testimony, Blair indicates that BMW floormats would have anchoring eyelets to secure

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[11] "All reasonable inferences arising from the undisputed facts should be made in favor of the nonmovant, but an inference based on speculation and conjecture is not reasonable." *Blackston*, 764 F.2d at 1482 (citations omitted).

[12] Plaintiff inaccurately recites the facts when she states that Ed Wagner testified "that there was a recall for the throttle housing unit on

the mats to the floor, thus, preventing them from shifting around due to movement of a driver's feet. (*Id.*) Blair indicates that the floormats in plaintiff's car lack these anchoring eyelets and then opines that such a lack of anchoring eyelets could result in the floormats shifting around such that the driver's floormat might impede the proper operation of the accelerator, brake and/or clutch pedals. (*Id.* at 60.) Blair further testifies, however, that he does not know what position the driver's floor mat was in at the time of the accident. (*Id.* at 55.)

Interestingly, plaintiff does not direct the Court's attention to any of plaintiff's testimony indicating that the floormats had any connection to the subject accident. Instead, plaintiff directs the Court's attention to Blair's testimony regarding the floormats and then asserts that an issue of fact exists with respect to a "defect" in plaintiff's car because the floormats were not BMW-approved floormats. (Pl.'s Resp. to Mot. for Summ. J. at 17.) Significantly, plaintiff offers no expert testimony or precedent supporting her theory that floormats without anchoring eyelets are "defective" or evidence linking the floormats to the subject accident.

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the 1991 BMW 535i model which involved a bushing that was too tight and would not let the throttle return all the way and causing it to take longer for the vehicle to stop . . . . " (Pl.'s Resp. to Mot. for Summ. J. at 19.) The exact testimony is as follows:

> Q Now, on these model vehicles, have you been aware of any kind of recall or campaign involving the throttle housing unit?
>
> A This is a 535, '91 535. I don't believe there has [sic] been recalls on the '91 535 throttle housing.
>
> Q Now, has there been a recall on the throttle housing unit of similar designed or other models of the '91 BMWs?
>
> A I believe there has been one on the 525. There has [sic] been on the '91 318s for different reasons.

(Wagner Dep. at 38.)

Plaintiff's failure to proffer any evidence of manufacture defects in her vehicle is reminiscent of the factual setting present in *Collins v. Byrd,* 204 Ga. App. 893, 420 S.E.2d 785 (1992). In *Collins,* plaintiff claimed that defendant General Motors had been negligent in the design and manufacture of one of its vehicles and she challenged the lower court's grant of summary judgment for defendant. *Id.* at 894. The George Court of Appeals affirmed the trial court and held that plaintiff's failure to provide any evidence of defect in design, manufacture, or operation during three years' of litigation authorized the lower court to conclude that defendant had not negligently manufactured or designed plaintiff's vehicle, and that no material issue of fact remained to be tried. *Id.* Similarly, throughout the roughly two-and-a-half years of this proceeding, plaintiff has failed to offer any evidence of her vehicle's defective condition.

Additionally, this situation is analogous to the one presented in *Michelin Tire Corp. v. Irving,* 185 Ga. App. 783, 366 S.E.2d 156 (1988). In Irving, plaintiff sued defendant tire manufacturer alleging strict liability for defective manufacture after plaintiff's vehicle rear-ended an eighteen-wheeled truck. Plaintiff offered only circumstantial evidence in the form of his own testimony to support his claim. Plaintiff alleged that immediately preceding the accident he heard a loud noise which, in his experience, sounded like a tire blowout. In support of its summary judgment motion, defendant offered deposition testimony from the driver of the other vehicle, who had rescued plaintiff from his burning vehicle. He testified that the tire in question was inflated at the time of the rescue, and that it exploded only as a result of the fire. *Id.* at 784. The *Irving* court noted that if the witness' testimony had solely addressed the explosive noises, a jury issue would exist as to when the blowout occurred. *Id.* Instead, his testimony

provided direct evidence that the tire was intact after the collision. *Id.* The court stated:

> Where direct and positive testimony is presented on an issue, the opposing party must show some other fact which contradicts the testimony. "[I]f this other fact is direct evidence, that is sufficient to allow the case to go to the jury; if the other fact is circumstantial evidence, it must be inconsistent with the defendant's evidence, or if consistent, it must demand a finding of fact on the issue in favor of the plaintiff."

Id. (citations omitted). Accordingly, the court held that summary judgment should have been granted to defendant as plaintiff's circumstantial evidence simply created an "inconclusive inference" which failed to overcome the witness' direct testimony. *Irving,* 185 Ga. App. at 784. The court further concluded that plaintiff's circumstantial evidence was not inconsistent with the witness' direct testimony because a loud noise could have resulted from something other than the tire. *Id.* at 785.

Similarly, plaintiff relies exclusively on her own circumstantial evidence to support her claim, yet fails to proffer any direct evidence that her vehicle was defective. As in Irving, plaintiff's thin circumstantial evidence merely creates an inconclusive inference, and does not create a material issue of fact to be tried. Furthermore, her testimony is not inconsistent with defendants' compelling direct expert testimony which proves that plaintiff's vehicle was not, and is not, defective. Indeed, it is entirely possible, and quite likely, that plaintiff's accident was nothing more than a simple collision on a rain-slicked road.[13] It is further

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[13] Interestingly, plaintiff's response to defendants' summary judgment motion asserts that the collision occurred after her vehicle "slid" into the vehicle in front of her. (Pl.'s Resp. to Mot. for Summ. J. [64] at 16.)

possible that plaintiff was driving too fast and/or too close under the wet driving conditions.[14] In this light, plaintiff's testimony does not illuminate any defects in her vehicle but, rather, explains why her accident occurred.

Additionally, plaintiff has failed to describe the purported defects with any reasonable precision. Her difficulty in describing the defects upon which her cause of action is based is reminiscent of *Humphreys v. General Motors Corp.*, 839 F.Supp. 822 (N.D.Fla. 1993), *aff'd without op.*, 47 F.3d 430 (11th Cir. 1995). In *Humphreys,* plaintiffs waited until nearly the end of the discovery period before even hinting at the nature of the alleged product defect, namely the failure of the vehicle's driver seat back locking device, and offered no direct evidence to substantiate their claim. *Id.* at 826. Instead, plaintiffs relied on their testimony to establish a defect, yet presented no expert evidence that the seat back was defective. *Id.*

In granting defendant's motion for summary judgment, the Humphreys court noted that this was not a case where the vehicle's alleged defect was patent. *Id.* Rather, it found that evaluating the sophisticated relationship between the dynamics of the accident and the vehicle's mechanical function "is beyond the capacity of lay persons and requires expert testimony." *Id.* at 827. *See also Brooks v. Colonial Chevrolet-Buick,* 579 So.2d 1328, 1333 (Ala. 1991) (concluding that plaintiffs' own testimony as to alleged defectiveness of brakes was mere speculation, and jury could not understand complexities of vehicle's brake system without assistance of expert testimony). As in *Humphreys,* plaintiff relies entirely on her own recollection of the accident and has failed to present any expert's affidavit to bolster her claim of product defect. In the absence of such a

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[14] Plaintiff was cited for following too closely by the police officer who responded to the scene.

showing, defendant's extensive evidence that plaintiff's vehicle was not defective remains unrefuted. Accordingly, the Court finds that summary judgment is appropriate.

Plaintiff's claim against BMW NA for its failure to disclose or warn plaintiff of the automobile's various defects is also devoid of evidence. In failure to warn cases, the duty to warn arises whenever the manufacturer knows or reasonably should know of the danger associated with the use of its product. *Talley v. City Tank Corp.*, 158 Ga. App. 130, 137, 279 S.E.2d 264 (1981). As stated above, plaintiff has failed to adduce any evidence that her automobile was defective or dangerous either before or after her accident. Thus, BMW NA had no duty to warn since there was no danger associated with the use of the vehicle. Accordingly, the Court grants defendants' motion on plaintiff's failure to warn claim against BMW NA.[15]

C. Lack of Evidence of Design Defect

Plaintiff further alleges that her vehicle's odometer was defectively designed,[16] and that said defect caused her

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[15] Plaintiff's response brief asserts that there are genuine issues to be tried as to whether BMW AG is strictly liable for failing to warn plaintiff about defects in the brakes, throttle housing unit, and floor mats. (Pl.'s Resp. to Mot. for Summ. J. at 19.) Similarly, she attempts to assert a new claim against BMW AG for failure to warn plaintiff about design defects in the odometer. (*Id.* at 22.) Had these issues been properly asserted in her Complaint, they would have failed for the reasons stated in Part II of the Court's Order. As this is the first instance that plaintiff has raised these issues before the Court, however, the Court declines to rule on these matters.

[16] Defendants object to portions of plaintiff's second affidavit, as well as portions of her husband's second affidavit, which opine that the odometer was "defective" as it could be easily disabled. (Dagi Aff. at ¶¶ 15, 16; T. Dagi Aff. at pars. 14, 15.) For the reasons stated in note 9, the Court sustains defendants' objection to the extent the testimony refers to the odometer as "defective."

damages.[17] Unlike her manufacturing defect claims, in which it is assumed that the vehicle's design is safe and damages stem from defendant's failure to manufacture the product in accordance with the design, her design defect claim questions defendant BMW AG's design of its entire product line of automobiles. *Banks v. ICI Ams.*, 264 Ga. 732, 733-34, 450 S.E.2d 671 (1994). Thus, a design defect cannot be detected merely by comparing the item to a properly designed one from the same product line, as is the case with a manufacturing defect. *Id.* Accordingly, plaintiff's design defect claim requires a separate analysis from her manufacturing defect claims. *Id.*

The Georgia Supreme Court recently adopted the risk-utility analysis in deciding design defect cases. *Id.* at 735. This analysis balances the risks inherent in a product design against the product's utility. *Id.* In assessing a product's design's utility, the primary factor to be considered is the feasibility of safer and more efficacious alternative designs which would have mitigated the product's foreseeable risks of harm and reduced defendant's justification for using the challenged design. *Banks,* 264 Ga. at 735-36.[18]

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[17] Defendants object to the admissibility of the plaintiff's and her husband's testimony to the extent they offer their opinions as to the value of plaintiff's automobile. (See Dagi Aff. at ¶ 17; T. Dagi Aff. at ¶ 16.) Plaintiff and her husband state these opinions as lay witnesses, not experts. Lay witnesses may give opinion testimony as to the value of motor vehicles and other personal property. *Meredith v. Hardy,* 554 F.2d 764, 765 (5th Cir. 1977). Therefore, plaintiff's and her husband's testimony as to the value of plaintiff's automobile is permissible, and defendants' motion to strike is denied in part.

[18] The *Banks* court stated that the following nonexhaustive list of factors may be helpful in determining whether a manufacturer's decision-making process was reasonable:

> [T]he usefulness of the product; the gravity and severity of the danger posed by the design; the likelihood of that danger; the avoidability of the danger, ie., the user's knowledge of the product,

Here, plaintiff claims that the vehicle's odometer was defectively designed as it could be disabled merely by pulling the fuse which controls the instrument cluster, thereby allowing it to be driven without recording any mileage.[19] Her reliance on evidence indicating the ability of a dealer to disable the odometer is misplaced. Such evidence would exist with respect to any automobile sold by any dealer.[20] She provides no evidence, however, that defendant BMW AG could have or should have employed a more feasible alternative design. In essence, plaintiff asks the Court to find that her vehicle is per se defective solely because defendant *could* have manipulated or tampered with it prior to its delivery to her. The Court refuses to apply such a broad reading of Georgia law.[21]

> publicity surrounding the danger, or the efficacy of warnings, as well as common knowledge and the expectation of danger; the user's ability to avoid danger; the state of the art at the time the product is manufactured; the ability to eliminate danger without impairing the usefulness of the product or making it too expensive; and the feasibility of spreading the loss in the setting of the product's price or by purchasing insurance.

Banks, 264 Ga. at 736-37 n.6.

[19] The odometer in plaintiff's car is electronic, rather than mechanical. Thus, the odometer display is blank when power is not supplied to the instrument cluster, as the same fuse that powers the odometer also powers all the other instruments in the dash of the car.

[20] Indeed, plaintiff could disable the odometer as easily as the dealer.

[21] Nor does the Court find that plaintiff suffered any discernible injury related to the alleged defect. Plaintiff claims that, had she been aware that the vehicle's odometer could be disabled so easily, she would never have purchased the car in the first place. (Pl.'s Resp. to Mot. for Summ. J. [64] at 3-4.) Additionally, she claims that the alleged defective design diminished the vehicle's value as the mileage on the vehicle was greater than it appeared. Nevertheless, plaintiff is unable to direct the Court's attention to any evidence that defendants ever tampered with her vehicle's odometer. Indeed, the Court has already granted summary judgment

D. BMW NA Not a Manufacturer

The Court also grants summary judgment for BMW NA on the alternative ground that it is not a manufacturer, and therefore not liable under a theory of strict liability in tort. The Georgia Code clearly states that "[f]or purposes of a product liability action based in whole or in part on the doctrine of strict liability in tort, a product seller is not a manufacturer as provided in Code Section 51-1-11 and is not liable as such." OCGA 51-1-11.1(b). Subsection (a) defines a "product seller" as "a person who, in the course of a business conducted for the purpose leases or sells and distributes . . . or is otherwise involved in placing a product in the stream of commerce." OCGA 51-1-11.1(a). This rule has been generally accepted and widely applied by the courts. *See Hatcher v. Allied Products Corp.*, 796 F.2d 1427, 1428 (11th Cir. 1986) (holding that district court properly rejected plaintiff's strict liability claim again defendant distributor as Georgia law imposes strict liability upon manufacturers only); *Freeman v. United Cities Propane Gas, Inc.*, 807 F.Supp. 1533, 1539 (M.D.Ga. 1992) (reading OCGA 51-1-11.1 as legislative attempt to limit strict liability to those entities having active role in the production, design, or assembly of products); *Hester v. Human*, 211 Ga. App. 351, 353, 439 S.E.2d 50 (1993) (holding that defendant was merely retailer who sold the equipment involved in the same condition in which he re-

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in favor of Chris Motors on plaintiff's odometer fraud claim. The Court concluded that plaintiff failed to adduce any direct or probative circumstantial evidence supporting her claim that Chris Motors tampered with her odometer. Similarly, plaintiff offers no evidence that either of the remaining defendants manipulated the vehicle's odometer.

ceived it and is not strictly liable), *cert. denied,* No. A93A1000, 1994 LEXIS 365 (Ga. Feb. 3, 1994). Here, there is no dispute that BMW NA is merely a distributor.[22] Furthermore, there is no evidence in the record that BMW NA is at all involved in the production, design, or assembly of BMW automobiles. Thus, the Court grants summary judgment to BMW NA on this alternative ground.

CONCLUSION

For the foregoing reasons, plaintiff's Motion for Leave to Amend Her Complaint to Conform to the Evidence [65] is DENIED, defendants' Motion for Summary Judgment [61] is GRANTED, and defendants' Motion to Strike Portions of the Second Affidavits of Linda Dagi and T. Forcht Dagi [68] is GRANTED in part and DENIED in part.

SO ORDERED, this 30 day of November, 1995.

/s/ Julie E. Carnes
JULIE E. CARNES
UNITED STATES DISTRICT JUDGE

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[22] Plaintiff's responsive brief, for example, repeatedly and admittedly refers to BMW NA as the product's "exclusive importer/distributor" and that it placed plaintiff's vehicle in "the stream of commerce." (Pl's Resp. to Mot. for Summ. J. [64] at 20, 22-23). Plaintiff seeks to avoid this flaw in her strict liability claims against defendant BMW NA by responding to defendants' motion for summary judgment as if she had asserted negligence-based claims instead. As decided earlier, however, the Court has denied plaintiff's motion to amend her complaint to assert negligence-based claims against BMW NA.

EXHIBIT 15

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL NO. 1:94-cv-2135-JEC

Linda Dagi

Plaintiffs,

vs.

Bayerische Motoren Werke, A.G., et. al.,

Defendants.

JUDGMENT

This action having come before the court, Honorable Julie E. Carnes, United States District Judge, for consideration of defendants motion for summary judgment, and the court having granted motion, it is

Ordered and Adjudged that the plaintiff, Linda Dagi, take nothing, that the action be dismissed, and that the defendants Bayerische Motoren Werke, A.G., BMW of North America, Inc., recover from the plaintiff the costs of this action.

Dated at Atlanta, Georgia, this 1st day of December, 1995.

Luther D. Thomas, Clerk

By: /s/ Dail S. Howard
Dail S. Howard
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
December 1, 1995

By: /s/ D. Howard
D. Howard
Deputy Clerk

EXHIBIT 16

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

CIVIL ACTION

FILE NO.

JURY TRIAL DEMANDED

LINDA DAGI,

Plaintiff,

vs.

BMW OF NORTH AMERICA, INC.
and CHRIS MOTORS CORPORATION,

Defendants.

[stamp—Filed in Office, 93 MAR 19 PM 2:11, Robert ??? ????, Clerk, State Court of Fulton County, Georgia]

COMPLAINT FOR DAMAGES

COMES NOW Linda Dagi Plaintiff in the above-styled action and hereby brings this her Complaint for Damages by showing the Court as follows:

PARTIES

1.

Plaintiff Linda Dagi (hereinafter referred to as "Dagi") is and at all times material to this action, was a resident of the State of Georgia.

2.

Defendant BMW of North America, Inc., (hereinafter referred to as "BMW") is a foreign corporation engaged in the business of manufacturing motor vehicles.

3.

At all times relevant hereto, Defendant BMW transacted business in the State of Georgia.

4.

Defendant BMW may be served through its registered agent, to-wit: C. T. Corporation System, 1201 Peachtree Street, N.E., Atlanta, Fulton County, Georgia 10361.

5.

Defendant BMW is subject to both the jurisdiction and venue of this Court.

6.

Defendant Chris Motors Corporation (hereinafter referred to as "Chris Motors") is a Georgia Corporation engaged in the business of the retail sale of BMW and other motor vehicle products.

7.

At all times material hereto, Defendant Chris Motors transacted business in the State of Georgia.

8.

Defendant Chris Motors may be served through its registered agent, to-wit: Neal Christman, 1606 Church Street, Decatur, DeKalb County, Georgia 30030.

9.

Defendant Chris Motors is subject to both the jurisdiction and venue of this Court.

FACTUAL ALLEGATIONS

10.

On or about May 13, 1992, at approximately 9:05 a.m., Plaintiff was operating a 1991 BMW 535i model automobile in a southerly direction on Briarcliff Road, at or near its intersection with Sheffield Drive, in the City of Atlanta, DeKalb County, Georgia.

11.

At said time and place, James Scott (hereinafter referred to as "Scott") was operating a 1984 Dodge Ram 350 vehicle, also in a southerly direction on Briarcliff Road, in the City of Atlanta, DeKalb County, Georgia.

12.

At said time and place, Plaintiff Dagi was traveling at a safe and reasonable distance behind Scott's vehicle.

13.

At said time and place, Scott was stopped at the intersection of Briarcliff and Sheffield Drive, attempting to make a left hand turn onto Sheffield Drive, when Plaintiff attempted to safely brake her BMW automobile with sufficient distance between her vehicle and Scott's vehicle to allow her to stop, under the speed and conditions existing at the time, but her vehicle would not decelerate or stop because of defects in the mechanical system in said vehicle, causing her vehicle to violently collide into the rear of Scott's vehicle.

14.

As a direct and proximate result of said collision, caused by the mechanical defects in Plaintiff's BMW automobile, Plaintiff's BMW sustained extensive damage.

15.

On or about April 2, 1992, Plaintiff purchased said 1991 BMW automobile from Defendant Chris Motors.

16.

Defendant Chris Motors represented, attested and certified to Plaintiff via an Odometer Disclosure Statement that there were only 5,391 miles driven on the subject BMW 535i automobile at the time she purchased said vehicle.

17.

The Odometer Disclosure Statement certifying that there were only 5,391 miles on said BMW 535i automobile was

signed and executed by E. W. Sweeney, III, the Sales Manager for Defendant Chris Motors.

18.

The VIN number for the subject BMW 535i automobile is WBAHD1315MBF11537.

19.

The purchase price for the subject BMW 535i automobile was approximately $38,022.14.

20.

From the time that Plaintiff purchased the subject BMW 535i automobile until the time of the subject May 13, 1992 incident, Plaintiff did not in any way change, alter or modify the subject BMW automobile.

COUNT I
STRICT LIABILITY
(BMW)

21.

The allegations in Paragraphs 1 - 20 of Plaintiff's Complaint are hereby incorporated by reference and made a part hereof, as if each such allegation was fully set forth herein.

22.

The subject BMW 535i automobile purchased by Plaintiff from Defendant Chris Motors was originally designed and manufactured by Defendant BMW in a defective condition unreasonably dangerous to the users and consumers of same, which included Plaintiff Dagi.

23.

The subject BMW 535i automobile was defective and unreasonably dangerous at the time it was placed into the stream of commerce by Defendant BMW and sold to the Plaintiff and said BMW automobile was not changed, altered

or modified in any way by Plaintiff at the time of the subject May 13, 1992 incident.

24.

The subject BMW 535i automobile was defective and unreasonably dangerous at the time of the subject May 13, 1992 incident.

25.

As a direct and proximate result of the defectively designed and unreasonably dangerous condition of the subject BMW 535i automobile, Plaintiff was involved in said collision causing her vehicle to sustain extensive damage.

26.

By reason of the foregoing, Plaintiff Dagi is entitled to recover from Defendant BMW damages in such an amount as may be shown by the evidence and determined by the jury in their enlightened conscience.

COUNT II
NEGLIGENCE
(CHRIS MOTORS)

27.

The allegations in Paragraphs 1 - 26 of Plaintiff's Complaint are hereby incorporated by reference and made a part hereof, as if each such allegation was fully set forth herein.

28.

Defendant Chris Motors sells BMW products, and specifically, 535i model automobiles throughout the State of Georgia and holds out to the public that said automobiles it sells are safe, are of merchantable quality and are fit for the use and purposes intended.

29.

Defendant Chris Motors' negligence, which constituted the direct and proximate cause of the subject incident described hereinabove, resulting in the damages claimed by Plaintiff, consisted of, among other things:

a) Failing to exercise reasonable care in the inspection and testing of said BMW 535i automobile for mechanical defects;

b) Distributing and selling said BMW 535i vehicle to the public, knowing or should have knowing that said automobile was not reasonably and adequately safe for usage by the public on the roads and highways;

c) Failing to warn purchasers of said automobile, and specifically, Plaintiff Dagi of the automobile's dangerous condition and failing to warn Plaintiff Dagi that said automobile was not reasonably and adequately safe for usage by the public on the roads and highways; and

d) Failing to exercise reasonable care in the maintenance of said BMW 535i automobile.

30.

As a direct and proximate result of Defendant Chris Motors' negligence, Plaintiff was involved in said collision causing her vehicle to sustain extensive damage.

31.

By reason of the foregoing, Plaintiff Dagi is entitled to recover from Defendant Chris Motors damages in such an amount as may be shown by the evidence and determined by the jury in their enlightened conscience.

COUNT III
FRAUD
(CHRIS MOTORS)

32.

The allegations in Paragraphs 1 - 31 of Plaintiff's Complaint are hereby incorporated by reference and made a

part hereof, as if each such allegation was fully set forth herein.

33.

Defendant Chris Motors represented and certified to Plaintiff Dagi that the subject BMW 535i automobile had been driven only 5,391 miles via an Odometer Disclosure Statement.

34.

At the time in which Defendant Chris Motors represented and certified to Plaintiff Dagi that the subject BMW 535i automobile had only 5,391 miles through said Odometer Disclosure Statement, Defendant Chris Motors knew that such representation to Plaintiff Dagi as to the mileage of said vehicle was false.

35.

Defendant Chris Motors made such representation regarding the mileage of said BMW 535i vehicle with the intention and purpose of deceiving Plaintiff Dagi.

36.

Plaintiff Dagi reasonably relied upon Defendant Chris Motors' representation and certification as to the mileage of the subject BMW 535i automobile.

37.

As a result of Defendant Chris Motors fraudulent representation with respect to the mileage of the subject BMW 535i automobile, Plaintiff Dagi sustained damages.

38.

By reason of the foregoing, Plaintiff Dagi is entitled to recover from Defendant Chris Motors damages in such an amount as may be shown by the evidence and determined by the jury in their enlightened conscience.

COUNT IV
PUNITIVE DAMAGES
(CHRIS MOTORS)

39.

The allegations in Paragraphs 1 - 38 of Plaintiff's Complaint are hereby incorporated by reference and made a part hereof, as if each such allegation was fully set forth herein.

40.

Defendant Chris Motors' actions and conduct in knowlingly misrepresenting the condition of the subject BMW 535i automobile to Plaintiff Dagi was fraudulent, willful and wanton, evincing an entire want of care, which would raise the presumption of a conscious indifference to the consequences to the members of the general public and to Plaintiff Dagi in particular, who would reasonably be expected to be affected by the actions and conduct of Defendant Chris Motors.

41.

By reason of the foregoing, Plaintiff Dagi is entitled to recover from Defendant Chris Motors punitive damages in an amount to be determined by the jury in their enlightened conscience in order to deter Defendant Chris Motors from engaging in similar misconduct in the future.

WHEREFORE, Plaintiff Linda Dagi prays and respectfully demands verdict and judgment as follows:

a) That summons and process issue and that each Defendant be served with a copy of this Complaint as required by law and that each Defendant be required to appear and answer;

b) That Plaintiff be awarded damages from the Defendants, jointly and severally, for the destruction of Plaintiff's BMW 535i automobile, in such an amount as may be shown by the evidence and determined in the enlightened conscience of the jury;

c) That Plaintiff be awarded punitive damages against Defendant Chris Motors, in such an amount as may be shown by the evidence and as may be determined in the enlightened conscience of the jury in order to deter said Defendant from engaging in similar misconduct in the future;

d) That Defendants be charged with all court costs attributable to this action and such other costs reasonably incurred in the prosecution and trial of this case;

e) That Plaintiff be granted a *trial by jury;* and

f) That Plaintiff be granted such other and further relief as may be shown by the evidence and authorized by law.

SMOLAR, ROSEMAN, BRANTLEY
& SEIFTER

/s/ Yehuda Smolar [By JIS ???]
YEHUDA SMOLAR
Ga. State Bar No. 665150

/s/ James I. Seifter
JAMES I. SEIFTER
Ga. State Bar No. 636584

Attorneys for Plaintiff
Linda Dagi

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(404) 525-3900

GEORGIA FULTON COUNTY

STATE COURT OF FULTON COUNTY
(Civil Division)

Case No. 93VS0070409F

LINDA DAGI,
(Plaintiff's Name and Address)

vs.

CHRIS MOTORS CORPORATION by and through its registered agent, to-wit: Neal Christman, 2020 Cobb Parkway, Marietta, GA
(Defendant's Name and Address)

TYPE OF SUIT XX Tort

SUMMONS

TO THE ABOVE NAMED-DEFENDANT:

You are hereby required to file with the Clerk of said court and to serve a copy on the Plaintiff's Attorney, or on Plaintiff if no Attorney, to-wit:

James I. Seifter, Esquire
SMOLAR, ROSEMAN, BRANTLEY & SEIFTER
101 Marietta Tower, Suite 3410
Atlanta, Georgia 30303
(404) 525-3900

an answer to the complaint which is herewith served on you, within (30) days after service on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint, plus cost of this action.

* * * * * * *

DEFENSE MAY BE MADE, AND JURY TRIAL DEMANDED, if desired, in the Clerk's Office at 102 State

Court of Fulton County Building. (Corner of Pryor and Mitchell Streets), S.W., Atlanta, Georgia 30303.

If the sum claimed in the suit, or value of the property sued for, is $300.00 or more Principal, the defendant must admit or deny the paragraphs of plaintiff's petition by making written Answer. Such paragraphs undenied will be taken as true. If the plaintiff's petition is sworn to, or if suit is based on an unconditional contract in writing, then the DEFENDANT'S ANSWER MUST BE SWORN TO.

If the principal sum claimed in the suit, or value of the property sued for, is less than $300.00 and is on a note, unconditional contract, account sworn to, or the petition sworn to, defense must be made by filing a sworn Answer setting up the facts relied on as a defense; other cases may be defended by filing an Appearance Card which may be obtained from the Clerk.

SERVED: This 07 day of APR , 1993.

/s/ D.C. McKenzie 235
DEPUTY MARSHAL
STATE COURT OF FULTON COUNTY

EXHIBIT 17

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
FILE NO. 1 94-CV-2135-JEC

LINDA DAGI,

Plaintiff,

v.

BAYERISCHE MOTOREN WERKE, A.G.,
BMW OF NORTH AMERICA, INC.,
and CHRIS MOTORS CORPORATION,

Defendants.

[stamp—Filed in Clerk's Office, U.S.D.C.-Atlanta, AUG 12 1994, Luther D. Thomas, Clerk, By: /s/ (illegible), Deputy Clerk]

[stamp (at bottom)—Consent form to proceed before a U.S. Magistrate and pretrial instructions received. /s/ RS]

PETITION FOR REMOVAL

TO: The Judges of the United States District Court
The Northern District of Georgia
Atlanta Division

The Petition of Defendants CHRIS MOTORS CORPORATION, BAYERISCHE MOTOREN WERKE, A.G. and BMW of NORTH AMERICA, INC. respectfully shows the Court as follows:

1.

A civil action has been brought against the Petitioners in the State Court of Fulton County, State of Georgia, by the

above-named Plaintiff, said action being designated as Civil Action No. 93VS0070409F, in which Plaintiff, in a Third Amended Complaint, has sought to recover from the Petitioners under numerous theories, including, but not limited to, a claim pursuant to the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §1981 *et seq.*

2.

By virtue of the Plaintiff's newly amended claim under the Motor Vehicle Information and Cost Savings Act, this Court has jurisdiction over the case pursuant to 15 U.S.C. §1989 and 28 U.S.C. §1331.

3.

Defendants attach a copy of the Summons and Complaint filed in the State Court of Fulton County, Georgia, marked Exhibit "A", a copy of Plaintiff's First Interrogatories to Defendant Chris Motors Corporation, marked as Exhibit "B", a copy of Plaintiff's First Request for Production of Documents to Defendant Chris Motors Corporation, marked as Exhibit "C", a copy of Plaintiff's First Request for Admissions to Defendant Chris Motors Corporation, marked as Exhibit "D", a copy of Plaintiff's March 19, 1993 Notice to Take Deposition (of Chris Motors Corporation's service manager), marked as Exhibit "E", a copy of Plaintiff's March 19, 1993 Notice to Take Deposition (of E. W. Sweeney), marked as Exhibit "F", a copy of Plaintiff's March 19, 1993 Notice to Take Deposition (of Sam Mihyar), marked as Exhibit "G", a copy of the Answer of Defendant BMW of North America, Inc. and Demand for Jury of Twelve Persons, marked as Exhibit "H", a copy of the Answer of Chris Motors Corporation, marked as Exhibit "I", a copy of Defendant Chris Motors Corporation's Answers to Plaintiff's First Request for Admissions, marked as Exhibit "J", a copy of Plaintiff's May 6, 1993 Notice to

Take Deposition (of Sam Mihyar), marked as Exhibit "K", a copy of Plaintiff's May 6, 1993 Notice to Take Deposition (of Chris Motors Corporation's service manager), marked as Exhibit "L", a copy of Plaintiff's May 6, 1993 Notice to Take Deposition (of E. W. Sweeney), marked as Exhibit "M", a copy of Defendant Chris Motors Corporation's Notice of Deposition (of T. Forcht Dagi), marked as Exhibit "N", a copy of Defendant Chris Motors Corporation's Notice of Deposition (of Linda R. Dagi), marked as Exhibit "O", a copy of Defendant BMW of North America's May 24, 1993 Certificate of Service of Discovery Materials, marked as Exhibit "P", a copy of Defendant BMW of North America's May 25, 1993 Certificate of Service of Discovery Materials, marked as Exhibit "Q", a copy of Motion for Leave to Amend Plaintiff's Complaint to Add Bayerische Motoren Werke, A.G. as a Party Defendant, marked as Exhibit "R", a copy of Brief in Support of Motion for Leave to Amend Plaintiff's Complaint to Add Bayerische Motoren Werke, A.G. as a Party Defendant, marked as Exhibit "S", a copy of Stipulation Extending Time for Plaintiff Linda Dagi to Respond to Defendant BMW of North America, Inc.'s First Interrogatories, First Request for Production of Documents and Request for Admissions pursuant to Official Code of Georgia, O.C.G.A. §9-11-6(b), marked as Exhibit "T", a copy of Yehuda Smolar's Application for Leave of Absence, marked as Exhibit "U", a copy of Application of Ben L. Weinberg, Jr. for Leave of Absence, marked as Exhibit "V", a copy of Order Granting Application of Ben L. Weinberg, Jr.'s for Leave of Absence, marked as Exhibit "W", a copy of Order Granting Leave to Add Bayerische Motoren Werke, A.G. as Party Defendant, marked as Exhibit "X", a copy of Plaintiff's Amended Complaint for Damages, marked as Exhibit "Y", a copy of Plaintiff's August 19, 1993 Notice to Take Deposition (of Stan Zangle), marked as Exhibit

"Z", a copy of Plaintiff's August 19, 1993 Notice to Take Deposition (of E. W. Sweeney, III), marked as Exhibit "AA", a copy of Amended Answer of BMW of North America, Inc., marked as Exhibit "BB", a copy of Application of Ben L. Weinberg, Jr. for Leave of Absence, marked as Exhibit "CC", a copy of Order Granting Application of Ben L. Weinberg, Jr. for Leave of Absence, marked as Exhibit "DD", a copy of Second Amended Complaint for Damages, marked as Exhibit "EE", a copy of Amended Answer of Chris Motors Corporation, marked as Exhibit "FF", a copy of Application of Ben L. Weinberg, Jr. for Leave of Absence, marked as Exhibit "GG", a copy of the Answer of BMW of North America, Inc. to Plaintiff's Second Amended Complaint, marked as Exhibit "HH", a copy of Order Granting Application of Ben L. Weinberg, Jr. for Leave of Absence, marked as Exhibit "II", a copy of the Answer of Bayerische Motoren Werke, A.G. to Plaintiff's Second Amended Complaint, marked as Exhibit "JJ", a copy of Application for Leave of Absence of Ben L. Weinberg, Jr., marked as Exhibit "KK", a copy of Order Granting Application of Ben L. Weinberg, Jr. for Leave of Absence, marked as Exhibit "LL", a copy of Third Amended Complaint for Damages, marked as Exhibit "MM", and a copy of Defendant Chris Motors Corporation's Answer to Plaintiff's Third Amended Complaint for Damages, marked as Exhibit "NN", all of which were filed in the State Court of Fulton County, Georgia.

4.

Now within thirty (30) days after service of Plaintiff's Third Amended Complaint for Damages, which sets forth a Federal cause of action, Defendant Chris Motors Corporation has filed this Petition for Removal of said action to this Honorable Court. All Defendants to the pending action concur in this Petition.

5.

This action is now removable by reason of Plaintiff's Third Amended Complaint for Damages, which sets forth a Federal cause of action pursuant to the Motor Vehicle Information and Cost Savings Act.

WHEREFORE, the Defendants file this Petition for Removal of said cause to this Court.

FAIN, MAYOR & WILEY, P.C.

/s/ Charles A. Wiley, Jr.
CHARLES A. WILEY, JR.
Georgia State Bar No. 758800

/s/ Brian H. Alligood
BRIAN A. ALLIGOOD
Georgia State Bar No. 012765
Attorneys for Defendant
Chris Motors Corporation

50 Hurt Plaza
Suite 300
Atlanta, Ga. 30303
(404) 688-6633

LONG, WEINBERG, ANSLEY & WHEELER

/s/ Charles K. Reed (by B. H. Alligood permission)
CHARLES K. REED
Georgia State Bar No. 597597
Attorney for Defendants
BMW of North America, Inc. and
Bayerische Motoren Werke, A.G.

999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309
(404) 876-2700

EXHIBIT 18

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

CIVIL ACTION
FILE NO. 93VS0070409F

LINDA DAGI,

Plaintiff,

v.

BAYERISCHE MOTOREN WERKE, A.G.,
BMW OF NORTH AMERICA, INC.,
and CHRIS MOTORS CORPORATION,

Defendants.

NOTICE OF REMOVAL

TO: Plaintiff above-named and her attorney of record,
Yehuda Smolar, Esq.
SMOLAR, ROSEMAN, BRANTLEY & SEIFTER
101 Marietta Tower, Suite 3410
Atlanta, Georgia 30303

TO: The Clerk of the State Court of Fulton County

PLEASE TAKE NOTICE that the undersigned has this day filed in the United States States District Court, Northern District of Georgia, Atlanta Division, the attached Petition for Removal, and copy of the pleadings filed in the State Court of Fulton County, Georgia, the same having been assigned Civil Action No. _____.

By virtue of law, the aforesaid case is now removed and further proceedings in the State Court of Fulton County are stayed.

FAIN, MAJOR & WILEY, P.C.

/s/ Charles A. Wiley, Jr. [by B. H. Alligood]
CHARLES A. WILEY, JR.
Georgia State Bar No. 758800

/s/ B. H. Alligood
BRIAN H. ALLIGOOD
Georgia State Bar No. 012765
Attorneys for Defendant
Chris Motors Corporation

300 The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303
(404) 688-6633

CERTIFICATE OF SERVICE

I, Brian H. Alligood, counsel for Defendant, Chris Motors Corporation, certify that I have this day served a copy of the foregoing Notice of Removal and the attached Petition for Removal, and copy of the pleadings filed in the State Court of Fulton County, State of Georgia, in this matter upon counsel for Plaintiff, Yehuda Smolar, Esq. and James I. Seifter, Esq., 101 Marietta Tower, Suite 3410, Atlanta, Georgia 30303, and counsel for co-Defendants, Charles K. Reed, Esq. and Ben L. Weinberg, Jr., Esq., 999 Peachtree Street, N.E., Suite 2700, Atlanta, Georgia 30309, and have forwarded a copy of the Petition for Removal, and pleadings filed in the State Court of Fulton County, State of Georgia, to the Clerk of said Court, each by mail in envelopes properly addressed with sufficient postage affixed thereon to carry the same to their destinations.

This 12th day of August, 1994.

/s/ Brian H. Alligood
BRIAN H. ALLIGOOD
Georgia State Bar No. 012765
Attorneys for Defendant
Chris Motors Corporation

300 The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303
(404) 688-6633

EXHIBIT 19

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
FILE NO. 1:94-CV-2135-JEC

LINDA DAGI,

Plaintiff,

vs.

BAYERISCHE MOTOREN WERKE, A.G.
BMW OF NORTH AMERICA, INC. and
CHRIS MOTORS CORPORATION,

Defendants.

[stamp--Filed in Clerk's Office, U.S.D.C.-Atlanta, SEP 12 1994,
Luther D. Thomas, Clerk, By: /s/ AN, Deputy Clerk]

PLAINTIFF'S MOTION TO REMAND

COMES NOW Linda Dagi, Plaintiff, and moves the United States District Court to remand this case to the State Court of Fulton County, Georgia, as follows:

GROUND I

1) Plaintiff moves the Court to remand this case to the State Court of Fulton County, Georgia on the ground that the notice of removal is untimely.

2) Plaintiff's initial Complaint for Damages was filed on March 19, 1993.

3) Said initial Complaint for Damages was served on Defendant BMW of North America, Inc. on March 22, 1993.

4) Said initial Complaint for Damages was served upon Defendant Chris Motors Corporation on April 7, 1993.

5) Said initial Complaint for Damages contained allegations of fact which stated a claim for odometer fraud under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§ 1981, 1989.

6) The Defendants' Notice of Removal was filed on August 12, 1994 and a copy of same was served on the Plaintiff on the same date.

7)The removal statute, 28 U.S.C. § 1446(b) requires that a notice of removal be filed within thirty (30) days after receipt by the defendants of a copy of the initial pleadings setting forth plaintiff's claim for relief.

8) Defendants Chris Motors Corporation and BMW of North America, Inc. received the initial pleading setting out facts that stated a claim for odometer fraud under 15 U.S.C. §§ 1981, 1989, on April 7, 1993, and March 22, 1993, respectively, but did not file a notice for removal until August 12, 1994.

9) Petitioners Chris Motors Corporation and BMW of North America, Inc. had been in receipt of the initial pleading setting out facts that stated a claim for odometer fraud under 15 U.S.C. §§ 1981, 1989, for sixteen months before filing their Notice of Removal. Therefore, the Notice of Removal is improper and untimely because of the failure to follow the procedure for removal set forth in 28 U.S.C. § 1446(b), which requires that a notice for removal be filed within thirty (30) days after receipt by the defendants of a copy of the initial pleading setting forth plaintiff's claim for relief.

10) In support of her Motion to Remand, Plaintiff submits and relies upon the Affidavit of Thomas Allan Rice in Support of Plaintiff's Motion to Remand, the Affidavit Re-

garding Deposition of Neil Christman, the Affidavit Regarding Deposition of Joyce Christman and the Brief in Support of Plaintiff's Motion to Remand.

11) Wherefore, the Plaintiff, Linda Dagi, moves this Court to remand this case to the State Court of Fulton County, Georgia.

GROUND II

1) Plaintiff moves this Court to sever Plaintiff's State law claims from the federal odometer fraud claim under the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§ 1981, 1989, and to remand the State law claims to the State Court of Fulton County, Georgia.

2) Plaintiff's Complaint for Damages, as amended, asserts a claim for odometer fraud under 15 U.S.C. §§ 1981, 1989 against Chris Motors Corporation, State law claims for fraud against Chris Motors Corporation, State law claims for negligence against Chris Motors Corporation, State law strict product liability products claims against Bayerische Motoren Werke, A.G. (BMW) and State law strict liability products claims against BMW of North America, Inc.

3) The removal statute, 28 U.S.C. § 1441(c), provides that, whenever a separate and independent claim or cause of action within the jurisdiction conferred by 28 U.S.C. § 1331 (federal question), is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the District Court may determine all issues therein, or, in its discretion. may remand all matters in which State law predominates.

4) Plaintiff shows that the State law claims for fraud and negligence against Chris Motors Corporation and the State law strict liability products claims against Bayerische Motoren Werke, A.G. (BMW) and BMW of North America, Inc.

should be severed and remanded to the State Court of Fulton County, Georgia, pursuant to 28 U.S.C. § 1441(c).

5)In support of her Motion to Remand said State law claims, Plaintiff submits and relies upon the Affidavit of Thomas Allan Rice in Support of Plaintiff's Motion to Remand, the Affidavit Regarding Deposition of Neil Christman, the Affidavit Regarding Deposition of Joyce Christman, and the Brief in Support of Plaintiff's Motion to Remand.

6) Wherefore, the Plaintiff, Linda Dagi, moves this Court to exercise its discretion and sever the federal odometer fraud claim form the State law fraud claims, negligence claims, and strict liability products claims and to remand said State law claims to the State Court of Fulton Conuty, Georgia, pursuant to 28 U.S.C. § 1441(c).

This 12th day of September, 1994.

SMOLAR, ROSEMAN, BRANTLEY
& SEIFTER

/s/ Yehuda Smolar
YEHUDA SMOLAR [By JIS ???]
Ga. State Bar No. 665150

/s/ James I. Seifter
JAMES I. SEIFTER
Ga. State Bar No. 636584

/s/ Thomas Allan Rice
THOMAS ALLAN RICE
Ga. State Bar No. 603400

Attorneys for Plaintiff
Linda Dagi

101 Marietta Tower
Suite 3410
Atlanta, Georgia 30303
(404) 525-3900

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing PLAINTIFF'S MOTION TO REMAND on opposing counsel by placing a true and accurate copy of the same in the United Stated Mail with adequate postage affixed and addressed as follows:

Charles K. Reed, Esquire
LONG, WEINBERG, ANSLEY & WHEELER
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309

Charles A. Wiley, Jr., Esquire
Brian H. Alligood, Esquire
FAIN, MAJOR & WILEY, P.C.
50 Hurt Plaza
Suite 300 Hurt Building
Atlanta, Georgia 30303

This 12th day of September, 1994.

/s/ Thomas Allan Rice
THOMAS ALLAN RICE

Attorney for Plaintiff
Linda Dagi

EXHIBIT 20

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
FILE NO. 1:94-CV-2135-JEC

LINDA DAGI,

Plaintiff,

vs.

BAYERISCHE MOTOREN WERKE, A.G.
BMW OF NORTH AMERICA, INC. and
CHRIS MOTORS CORPORATION,

Defendants.

[stamp—Filed in Clerk's Office, U.S.D.C.-Atlanta, SEP 12 1994,
Luther D. Thomas, Clerk, By: /s/ AN, Deputy Clerk]

**BRIEF IN SUPPORT OF PLAINTIFF'S
MOTION TO REMAND**

I.

THIS CASE SHOULD BE REMANDED SINCE THE NOTICE OF REMOVAL WAS UNTIMELY.

Plaintiff shows that the Notice of Removal of this case from the State Court of Fulton County, Georgia to this Court was untimely, in that the Defendants' Notice of Removal was not filed within thirty (30) days after receipt by the Defendants of a copy of the initial pleading setting forth Plaintiff's claim for odometer fraud, as required by 28

U.S.C.A. § 1446(b). Therefore, Plaintiff's Motion to Remand should be granted.

As to the time in which a Notice of Removal must be filed by the Defendants, 28 U.S.C. § 1446(b) provides, as follows:

> b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

In the case *sub judice,* Plaintiff's initial Complaint for Damages was filed on March 19, 1993, was served on Defendant BMW of North America, Inc. on March 22, 1993, and was served on Defendant Chris Motors Corporation on April 7, 1993. See the Affidavit of Thomas Allan Rice in Support of Plaintiff's Motion to Remand, Paragraphs 5, 6, and 7 and Exhibits "1," "2," and "3" attached hereto.

Plaintiff's initial complaint for Damages sets out facts that state a claim for odometer fraud under 15 U.S.C. §§ 1981, 1989, as follows:

15.

On or about April 2, 1992, Plaintiff purchased said 1991 BMW automobile from Defendant Chris Motors.

16.

Defendant Chris Motors represented, attested and certified to Plaintiff via an Odometer Disclosure Statement that there were only 5,391 miles driven on the subject BMW 535i automobile at the time she purchased said vehicle.

17.

The Odometer Disclosure Statement certifying that there were only 5,391 miles on said BMW 535i automobile was signed and executed by E. W. Sweeney, III, the Sales Manager for Defendant Chris Motors.

18.

The VIN number for the subject BMW 535i automobile is WBAHD1315MBF11537.

19.

The purchase price for the subject BMW 535i automobile was approximately $38,022.14.

20.

From the time that Plaintiff purchased the subject BMW 535i automobile until the time of the subject May 13, 1992 incident, Plaintiff did not in any way change, alter or modify the subject BMW automobile.

* * *

COUNT III
FRAUD
(CHRIS MOTORS)

32.

The allegations in Paragraphs 1 - 31 of Plaintiff's Complaint are hereby incorporated by reference and made a part hereof, as if each such allegation was fully set forth herein.

33.

Defendant Chris Motors represented and certified to Plaintiff Dagi that the subject BMW 535i automobile had been driven only 5,391 miles via an Odometer Disclosure Statement.

34.

At the time in which Defendant Chris Motors represented and certified to Plaintiff Dagi that the subject BMW 535i automobile had only 5,391 miles through said Odometer Disclosure Statement, Defendant Chris Motors knew that such representation to Plaintiff Dagi as to the mileage of said vehicle was false.

35.

Defendant Chris Motors made such representation regarding the mileage of said BMW 535i vehicle with the intention and purpose of deceiving Plaintiff Dagi.

36.

Plaintiff Dagi reasonably relied upon Defendant Chris Motors' representation and certification as to the mileage of the subject BMW 535i automobile.

37.

As a result of Defendant Chris Motors fraudulent representation with respect to the mileage of the subject

BMW 535i automobile, Plaintiff Dagi sustained damages.

38.

By reason of the foregoing, Plaintiff Dagi is entitled to recover from Defendant Chris Motors damages in such an amount as may be shown by the evidence and determined by the jury in their enlightened conscience.

Thus, it is seen that Defendants Chris Motors Corporation and BMW of North America, Inc. received the initial pleading setting out facts that stated a claim for odometer fraud under 15 U.S.C. §§ 1981, 1989, on April 7, 1993 and March 22, 1993, respectively, but did not file their Notice of Removal until August 12, 1994. Therefore, the Notice of Removal is improper and untimely because of the failure to follow the procedure for removal set forth in the first paragraph of 28 U.S.C. § 1446(b).

The removal statute, 28 U.S.C. §1446(b), requires the filing of a notice of removal within thirty (30) days of the receipt by the defendants of "a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." There is no requirement that a federal statute be referred to by either name or code section. See *Gable vs. Local Union #387 International Association of Bridge, Structural and Ornamental Iron Workers,* 695 F. Supp. 1174 (N.D. 1988), in which the court stated, at page 1175: "The reviewing court looks to the substance of the complaint and not the labels used in it." The plaintiff's complaint merely needs to contain a statement of facts that provides the defendants with a clue that a removable claim or cause of action is stated. See *Kaneshiro vs. North American Company for Life and Health Insurance,* 496 F.Supp. 452, 462 (1980); *Kanter & Eisenberg vs. Madison Associates,* 602 F.Supp. 798, 801 (1985); and *Golke vs. Lee Lumber & Building Materials Corporation,* 671 F.Supp. 568, 571 (1987).

In the *Golke vs. Lee Lumber & Building Material Corporation* case, the Court stated, at 671 F.Supp., pp. 570-571, as follows:

> [1] A resolution of the timeliness issue necessarily hinges upon whether the plaintiff's initial complaint stated a claim for retaliatory discharge[1] under Illinois law. If we find that it did so, the first paragraph of section 1446(b) applies, if not, the second paragraph applies.
>
> * * *
>
> [2] An examination of Golke's initial complaint reveals that these two key elements were alleged adequately, though somewhat inartfully.
>
> * * *
>
> While we believe that Golke's initial complaint may have impermissibly attempted to combine a cause of action for retaliatory discharge with a cause of action based upon a statutory violation of the Workers' Compensation Act, we cannot say that the key elements of a retaliatory discharge claim were not present in Golke's initial complaint. *Nor can we say that Lee Lumber had "no clue" that Golke's initial complaint attempted to state a cause of action for retaliatory discharge.* See Kanter v. Eisenberg v. Madison Associates, 602 F.Supp. 798, 801 (N.D.Ill. 1985); Kaneshiro & North American Company for Life and Health Insurance, 496 F.Supp. 452, 462 (D.Haw. 1980). (Emphasis Added.)

A comparison of the initial complaint and the amended complaint bears out this conclusion. A close scrutiny of the amended complaint reveals that the content and substance of the initial complaint remained unchanged. Golke employed the same phraseology in both complaints. In fact, Golke's amendment did not alter the

complexion of his cause of action as originally pleaded; it merely segregated his cause of action into four different counts. Under these circumstances, we conclude that the initial complaint, although arguably, inartfully pleaded, fairly stated a colorable claim for retaliatory discharge.

[3] Since we have concluded that Golke's initial complaint fairly stated a claim for retaliatory discharge, the first paragraph of Section 1446(b) applies. According to the dictates of that paragraph, Lee Lumber should have filed its removal petition within thirty days of receiving Golke's initial complaint. As mentioned previously, although the pleadings before the Court do not pinpoint the precise date on which Lee Lumber was served with the initial complaint, service could not have occurred any later than October 29, 1984, the date on which Lee Lumber's Appearance was filed in state court. Obviously, Lee Lumber's removal petition, filed on July 14, 1987, falls well outside of the thirty day limitation period prescribed in 28 U.S.C. §1446(b). This limitation period is mandatory and strict compliance is required. See *Dial-In, Inc. v. ARO Corp.*, 620 F.Supp. 27, 29 (N.D.Ill. 1985); *Ortiz v. General Motors Acceptance Corporation, Inc.*, 583 F.Supp. 526, 529-30 (N.D.Ill. 1984); *Perrin v. Walker*, 385 F.Supp. 945, 948 (E.D.Ill. 1974). Accordingly, we hold that Lee Lumber's petition for removal was untimely and we grant Golke's motion to remand this action to the Circuit Court of Cook County, Illinois. Because we conclude that this action was not properly removed, we need not reach the issue of preemption.[3]

In *Golke vs. Lee Lumber & Building Materials Corporation*, 671 F.Supp. 568, at page 571, the Court noted that the substance of the claim stated in the initial complaint remained the same as in the amended complaint and did not

alter the complexion of plaintiff's cause of action as originally pleaded, by merely segregating his cause of action in different counts and that the amended complaint did not afford a basis for removing an action that should have been timely removed based on the allegations of the initial complaint.

The same reasoning applies to the case *sub judice*. The Defendant's Notice of Removal should have been filed within thirty (30) days of receipt of copies of the initial Complaint for Damages, which stated a claim for odometer fraud under 15 U.S.C. §§ 1981, 1989, and the filing of Plaintiff's Third Amended Complaint on July 18, 1994, containing a claim for odometer fraud under 15 U.S.C. §§1981, 1989, which was in substance the same claim asserted in the initial Complaint for Damages, did not make the case removable under 28 U.S.C. §1446(b).

The substance of the claim for odometer fraud in the initial Complaint for Damages is the same as the substance of the claim for odometer fraud in Plaintiff's Third Amended Complaint. See paragraphs 15, 16, 17, 18, 19, 20, 32, 33, 34, 35, 36, 37 and 38 of Plaintiff's initial Complaint for Damages Attached as Exhibit "1" to the Affidavit of Thomas Allan Rice in Support of Plaintiff's Motion to Remand) and paragraphs 19, 20, 21, 22, 23, 24, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, and 56 of Plaintiff's third Amended Complaint for Damages (Attached as Exhibit "7" to the Affidavit of Thomas Allan Rice in Support of Plaintiff's Motion to Remand).

It is clear that, when the initial Complaint for Damages was served on Chris Motors Corporation, both the president, Neil Christman, and the general manager, Joyce ("Jody") Christman, were aware that federal law was applicable to the disclosure of mileage on the odometer statement. See paragraph 6 of the Affidavit Regarding Deposition of Neil Christman and cited pages of Exhibit "X," the August 30,

1994 deposition of Neil Christman; and paragraph 6 of the Affidavit Regarding Deposition of Joyce Christman, and cited pages of Exhibit "Y," the August 30, 1994 deposition of Joyce Christman. Therefore, there can be no question that the president and general manager of Chris Motors were aware that Plaintiff's initial Complaint for Damages stated a claim for federal odometer fraud.

The Plaintiff, Linda Dagi, moves this Court to remand this case to the State Court of Fulton County, Georgia, on the ground that the Notice of Removal of this case from the State Court of Fulton County, Georgia to this Court was untimely, in that Defendants' Notice of Removal was not filed within thirty (30) days after receipt by the Defendants of a copy of the initial pleading setting forth Plaintiff's claim for odometer fraud, as required by 28 U.S.C.§ 1446(b). Therefore, Plaintiff's Motion to Remand should be granted.

II.

THE PLAINTIFF'S STATE LAW CLAIMS SHOULD BE SEVERED FROM THE FEDERAL ODOMETER FRAUD CLAIM AND REMANDED.

Plaintiff shows that Plaintiff's Complaint for Damages, as amended, asserts a claim for odometer fraud under 15 U.S.C. §§ 1981, 1989 against Chris Motors Corporation, State law claims for fraud against Chris Motors Corporation, State law claims for negligence against Chris Motors Corporation, State law strict liability products claims against Bayerische Motoren Werke, A.G. (BMW) and State law strict liability claims against BMW of North America. In this connection, see the September 9, 1994 Affidavit of Thomas Allan Rice in Support of Plaintiff's Motion to Remand, paragraphs 5 and 11, and the attached March 19, 1993 Complaint for Damages, Exhibit "1" to said Affidavit, and the July 18, 1994 Third Amended Complaint for Damages, Exhibit "7" to said Affidavit.

The removal statute, 28 U.S.C. § 1441(c), provides that, whenever a separate and independent claim or cause of action within the jurisdiction conferred by 28 U.S.C. § 1331 (federal question), is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the District Court may determine all issues therein, or, *in its discretion,* may remand all matters in which State law predominates.

Plaintiff shows that the State law claims for fraud and negligence against Chris Motors Corporation and the State law strict liability products claims against Bayerische Motoren Werke, A.G. (BMW) and BMW of North America, Inc. should be severed and remanded to the State Court of Fulton County, Georgia, pursuant to 28 U.S.C. § 1441(c).

WHEREFORE, the Plaintiff, Linda Dagi, moves this Court to exercise its discretion and sever the federal odometer claim fraud from the State law fraud claim, negligence claim, and strict liability products claims and to remand said State law claims to the State Court of Fulton County, pursuant to 28 U.S.C. § 1441(c).

This 12th day of September, 1994.

SMOLAR, ROSEMAN, BRANTLEY
& SEIFTER

/s/ Yehuda Smolar
YEHUDA SMOLAR [By JIS ???]
Ga. State Bar No. 665150

/s/ James I. Seifter
JAMES I. SEIFTER
Ga. State Bar No. 636584

/s/ Thomas Allan Rice [By JIS ???]
THOMAS ALLAN RICE
Ga. State Bar No. 603400

Attorneys for Plaintiff
Linda Dagi

101 Marietta Tower
Suite 3410
Atlanta, Georgia 30303
(404) 525-3900

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND on opposing counsel by placing a true and accurate copy of the same in the United Stated Mail with adequate postage affixed and addressed as follows:

Charles K. Reed, Esquire
LONG, WEINBERG, ANSLEY & WHEELER
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309

Charles A. Wiley, Jr., Esquire
Brian H. Alligood, Esquire
FAIN, MAJOR & WILEY, P.C.
50 Hurt Plaza
Suite 300 Hurt Building
Atlanta, Georgia 30303

This 12th day of September, 1994.

/s/ Thomas Allan Rice [By JIS ???]
THOMAS ALLAN RICE

Attorney for Plaintiff
Linda Dagi

EXHIBIT 21

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
FILE NO. 1:94-CV-2135-JEC

LINDA DAGI,

Plaintiff,

vs.

BAYERISCHE MOTOREN WERKE, A.G.
BMW OF NORTH AMERICA, INC. and
CHRIS MOTORS CORPORATION,

Defendants.

[stamp—Filed in Clerk's Office, U.S.D.C.-Atlanta, SEP 12 1994,
Luther D. Thomas, Clerk, By: /s/ AN, Deputy Clerk]

NOTICE OF MOTION TO REMAND REMOVED ACTION

TO: Bayerische Motoren Werke, A.G. and BMW of North American, Inc. and their counsel of record,
Charles K. Reed, Esquire
LONG, WEINBERG, ANSLEY & WHEELER
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309

and

Chris Motors Corporation and its counsel of record
Charles A. Wiley, Jr., Esquire
Brian H. Alligood, Esquire

FAIN, MAJOR & WILEY, P.C.
50 Hurt Plaza
Suite 300 Hurt Building
Atlanta, Georgia 30303

PLEASE TAKE NOTICE that, on September 12, 1994, the Plaintiff, Linda Dagi, filed her Motion for Remand of the above-captioned case pending in this Court to the State Court of Fulton County. A copy of said Motion to Remand, supporting Affidavits and Brief have been served upon counsel for the Defendants.

This 12th day of September, 1994.

SMOLAR, ROSEMAN, BRANTLEY
& SEIFTER

/s/ Yehuda Smolar
YEHUDA SMOLAR [By Thomas Allan Rice]
Ga. State Bar No. 665150

/s/ James I. Seifter
JAMES I. SEIFTER [By Thomas Allan Rice]
Ga. State Bar No. 636584

/s/ Thomas Allan Rice
THOMAS ALLAN RICE
Ga. State Bar No. 603400

Attorneys for Plaintiff
Linda Dagi

101 Marietta Tower
Suite 3410
Atlanta, Georgia 30303
(404) 525-3900

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing NOTICE OF MOTION TO REMAND REMOVED ACTION on opposing counsel by placing a true and accurate copy of the same in the United Stated Mail with adequate postage affixed and addressed as follows:

Charles K. Reed, Esquire
LONG, WEINBERG, ANSLEY & WHEELER
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309

Charles A. Wiley, Jr., Esquire
Brian H. Alligood, Esquire
FAIN, MAJOR & WILEY, P.C.
50 Hurt Plaza
Suite 300 Hurt Building
Atlanta, Georgia 30303

This 12th day of September, 1994.

/s/ Thomas Allan Rice
THOMAS ALLAN RICE

Attorney for Plaintiff
Linda Dagi

EXHIBIT 22

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
FILE NO. 1:94-CV-2135-JEC

LINDA DAGI,

Plaintiff,

vs.

BAYERISCHE MOTOREN WERKE, A.G.
BMW OF NORTH AMERICA, INC. and
CHRIS MOTORS CORPORATION,

Defendants.

[stamp—Filed in Clerk's Office, U.S.D.C.-Atlanta, OCT 13 1994,
Luther D. Thomas, Clerk, By: /s/ JW, Deputy Clerk]

**REPLY BRIEF IN SUPPORT OF
PLAINTIFF'S MOTION TO REMAND**

COMES NOW Linda Dagi, Plaintiff in the above-styled case, and within the time provided by Local Rule 220(b) (2) and Rule 6(a) and (e) of the Federal Rules of Civil Procedure, files her Reply Brief in Support of Plaintiff's Motion to Remand, showing the Court, as follows:

I.

THIS CASE SHOULD BE REMANDED SINCE THE NOTICE OF REMOVAL WAS UNTIMELY.

Plaintiff shows that the Notice of Removal of this case from the State Court of Fulton County, Georgia to this

Court was untimely, in that the Defendants' Notice of Removal was not filed within thirty (30) days after receipt by the Defendants of a copy of the initial pleading setting forth Plaintiff's claim for odometer fraud, as required by 28 U.S.C.A. § 1446(b). Therefore, Plaintiff's Motion to Remand should be granted.

At pages 2-11 of Defendant Chris Motors' Brief in Opposition to Plaintiff's Motion to Remand, the Defendant cites a variety of cases dealing with removal issues, including the well-pleaded complaint rule, the artful pleading doctrine, preemption, etc. There is nothing stated in said cases that can change the fact that, under the well-pleaded complaint rule, the allegations in Plaintiff's initial Complaint for Damages stated a federal claim for odometer fraud under 15 U.S.C. §§ 1981, 1989 and that the Notice of Removal was untimely, in that it was not made within thirty (30) days of the receipt of copies of the initial Complaint for Damages by the Defendants.

The determination of whether a plaintiff has filed a well-pleaded complaint, setting out a federal claim or cause of action that is removable under 28 U.S.C. § 1446(b), depends on the facts stated in the Complaint. As shown at pages 2-5 of Plaintiff's September 12, 1994 Brief in Support of Plaintiff's Motion to Remand, paragraphs 15, 16, 17, 18, 19, 20, 32, 33, 34, 35, 36, 37, and 38 of Plaintiff's initial Complaint for Damages set out facts that stated a federal claim for odometer fraud under 15 U.S.C. §§ 1981, 1989.

The removal statute, 28 U.S.C. § 1445(b), requires the filing of a notice of removal within thirty (30) days of the receipt by the defendants of a "copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." There is no requirement that a federal statute be referred to by either name or code section. See *Gable vs. Local Union #387 International Association of*

Bridge, Structural and Ornamental Iron Workers, 695 F.Supp. 1174 (N.D. Ga. 1988), in which the court stated, at page 1175: "The reviewing court looks to the substance of the complaint and not the labels used in it."; *Downey vs. Geary-Wright Tobacco Co.,* 39 F.Supp. 33 (E.D.Ky. 1941), in which the Court stated, at page 36: "As the Court takes judicial notice of the federal law involved, the omission of specific reference thereto in the pleadings is immaterial."; *Kolkin vs. Gotham Sportswear,* 10 F.Supp. 682 (S.D.N.Y. 1935), in which the Court stated, at page 684: "It does not matter that the Sherman Anti-Trust Act and Clayton Act are not mentioned by name in the complaint."; and 76 *Corpus Juris Secundum* § 75, at page 968, wherein it is stated: "The omission from plaintiff's pleading of a specific reference to any law of the United States does not prevent removal where the allegations of such pleading show that the suit arises under a law of the United States."

The fact that a federal claim for odometer fraud is stated is obvious from the allegations of odometer fraud and reference to the Odometer Disclosure Statement in paragraphs 17, 33, and 34 of the initial Complaint for Damages. Reference to the Odometer Disclosure Statement, which is required by 15 U.S.C. § 1981 *et. seq.,* makes it clear that there was no attempt to restrict the complaint to a state claim of common law fraud. Moreover, it is clear that, when the initial Complaint for Damages was served on Chris Motors Corporation, both the president, Neil Christman, and the general manager, Joyce ("Jody") Christman, were aware that federal law was applicable to the disclosure of mileage on the odometer disclosure statement. See paragraph 6 of the Affidavit Regarding Deposition of Neil Christman and cited pages of Exhibit "X," the August 30, 1994 deposition of Neil Christman; and paragraph 6 of the Affidavit Regarding Deposition of Joyce Christman, and cited pages of Exhibit "Y," the August 30, 1994 deposition of Joyce Christman.

Therefore, there can be no question that the president and general manager of Chris Motors were aware that Plaintiff's initial Complaint for Damages stated a claim for federal odometer fraud.

Under the circumstances, it cannot be argued that the Defendant was "without a clue" that a federal claim or cause of action was stated. See *Kaneshiro vs. North American Company for Life and Health Insurance,* 496 F.Supp. 452, 462 (1980); *Kanter & Eisenberg vs. Madison Associates,* 602 F.Supp. 798, 801 (1985); and *Golke vs. Lee Lumber & Building Materials Corporation,* 671 F.Supp. 568, 571 (1987).

In *Golke vs. Lee Lumber & Building Materials Corporation,* 671 F.Supp. 568, at page 571, the Court noted that the substance of the claim stated in the initial complaint remained the same as in the amended complaint and did not alter the complexion of plaintiff's cause of action as originally pleaded, by merely segregating his cause of action in different counts and that the amended complaint did not afford a basis for removing an action that should have been timely removed based on the allegations of the initial complaint.

The same reasoning applies to the case *sub judice.* The Defendant's Notice of Removal should have been filed within thirty (30) days of receipt of copies of the initial Complaint for Damages, which stated a claim for odometer fraud under 15 U.S.C. §§ 1981, 1989, and the filing of Plaintiff's Third Amended Complaint on July 18, 1994, containing a claim for odometer fraud under 15 U.S.C. §§1981, 1989, which was in substance the same claim asserted in the initial Complaint for Damages, did not make the case removable under 28 U.S.C. § 1446(b).

The substance of the claim for odometer fraud in the initial Complaint for Damages is the same as the substance

of the claim for odometer fraud in Plaintiff's Third Amended Complaint. See paragraphs 15, 16, 17, 18, 19, 20, 32, 33, 34, 35, 36, 37 and 38 of Plaintiff's initial Complaint for Damages Attached as Exhibit "1" to the Affidavit of Thomas Allan Rice in Support of Plaintiff's Motion to Remand) and paragraphs 19, 20, 21, 22, 23, 24, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, and 56 of Plaintiff's Third Amended Complaint for Damages (Attached as Exhibit "7" to the Affidavit of Thomas Allan Rice in Support of Plaintiff's Motion to Remand).

The Plaintiff, Linda Dagi, moves this Court to remand this case to the State Court of Fulton County, Georgia, on the ground that the Notice of Removal of this case from the State Court of Fulton County, Georgia to this Court was untimely, in that Defendants' Notice of Removal was not filed within thirty (30) days after receipt by the Defendants of a copy of the initial pleading setting forth Plaintiff's claim for odometer fraud, as required by 28 U.S.C. § 1446(b). Therefore, Plaintiff's Motion to Remand should be granted.

II.

THE PLAINTIFF'S STATE LAW CLAIMS SHOULD BE SEVERED FROM THE FEDERAL ODOMETER FRAUD CLAIM AND REMANDED.

Plaintiff shows that Plaintiff's Complaint for Damages, as amended, asserts a claim for odometer fraud under 15 U.S.C. §§ 1981, 1989 against Chris Motors Corporation, State law claims for fraud against Chris Motors Corporation, State law claims for negligence against Chris Motors Corporation, State law strict liability products claims against Bayerische Motoren Werke, A.G. (BMW) and State law strict liability claims against BMW of North America. In this connection, see the September 9, 1994 Affidavit of Thomas Allan Rice in Support of Plaintiff's Motion to Remand, paragraphs 5 and 11, and the attached March 19,

1993 Complaint for Damages, Exhibit "1" to said Affidavit, and the July 18, 1994 Third Amended Complaint for Damages, Exhibit "7" to said Affidavit.

The removal statute, 28 U.S.C. § 1441(c), provides that, whenever a separate and independent claim or cause of action within the jurisdiction conferred by 28 U.S.C. § 1331 (federal question), is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the District Court may determine all issues therein, or *in its discretion,* may remand all matters in which State law predominates.

At pages 11-12 of Defendant Chris Motors' Brief in Opposition to Plaintiff's Motion to Remand, the Defendant cites four cases for the proposition that a federal court may exercise pendent jurisdiction over state court claims, i.e.: *Clayton vs. McCary,* 426 F.Supp. 248, 259 (N.D.Ohio 1976); *Mitchell vs. White Motor Credit Corporation,* 627 F.Supp. 1241, 1247 (M.D.Tenn. 1986); *Reiff vs. Don Rosen Cadillac - BMW, Inc.,* 501 F.Supp. 77 (E.D.Penn. 1980); and *Fasco Industries, Inc. Vs. Mack,* 843 F.Supp. 1251 (N.D.Ill. 1994). These cases are inapposite to the issue before the Court - i.e., whether the state law claims should be severed from the federal odometer claim and remanded to the State Court of Fulton County, in that none of the four cases involves a removed action or a motion to sever and remand state court claims. These cases merely hold that, under the doctrine of pendent jurisdiction, a federal district court may consider state court claims contained in a complaint filed in federal court.

However, under the facts of this case, it is clear that the Court should exercise its discretion under 28 U.S.C. § 1441(c) to sever the federal odometer fraud claim from the State law claims for fraud and negligence against Chris Motors Corporation and the State law strict liability products

claims against Bayerische Motoren Werke, A.G. (BMW) and BMW of North America, Inc. and remand said State law claims to the State Court of Fulton County, Georgia, pursuant to 28 U.S.C. § 1441(c).

WHEREFORE, the Plaintiff, Linda Dagi, moves this Court to exercise its discretion and sever the federal odometer fraud claim from the State law fraud claim, negligence claim, and strict liability products claims and to remand said State law claims to the State Court of Fulton County, pursuant to 28 U.S.C. § 1441(c).

III.

PLAINTIFF HAS NOT WAIVED THE RIGHT TO REMAND THIS ACTION.

At pages 12-13 of Defendant Chris Motors' Brief in Opposition to Plaintiff's Motion to Remand, the Defendant argues that Plaintiff's engagement in discovery after remand constitutes a waiver of any objections to the removal. Said argument is totally without merit and is not supported by the authorities cited at pages 12 of Defendant's Brief.

In *Nolan vs. Prime Tanning Company,* 871 F.Supp. 76 (8th Cir. 1989), waiver was found where plaintiff did not file a timely motion to remand and spent two years actively participating in litigation without raising the issue of jurisdiction. In *Johnson vs. Helmerich & Payne, Inc.,* 892 F.2d 422 (5th Cir. 1990), waiver was found where plaintiff did not file a timely motion for remand and litigated the case for almost four months before filing a motion to remand. In *Lanier vs. American Board of Endodontics,* 843 F.2d 901 (6th Cir. 1988), waiver was found where the plaintiff did not file a motion to remand until after she took the affirmative action of submitting herself to the jurisdiction by filing a second action in federal district court, which was later consolidated with the pending removed action. In *Wade*

vs. Fireman's Fund Insurance Company, 716 F.Supp. 226 (M.D.La. 1989), waiver was found where the plaintiff never filed a motion to remand and actively participated in the case for nearly six months without raising any question as to the propriety of the removal. Thus, it is seen that these cases do not hold that there can be a waiver of the right to remand by merely engaging in discovery after removal.

In the present case, there has been no waiver of the right to remand. A timely motion to remand was filed within thirty (30) days of the notice of removal. The issue of remand because of untimely removal was also raised in paragraph 4 and Attachment "A" of The Joint Preliminary Statement and Scheduling Order. Also, during the depositions taken after removal, it was stated: "Well, we are taking it either pursuant to the federal or state CPA, regardless of whichever applies." (August 30, 1994 deposition of Neil Christman, page 3, lines 24-25, and page 4, line 1.)

Merely engaging in discovery after the removal does not amount to a waiver of the right to remand. There is no provision in either the Federal Rules of Civil Procedure or

the Local Rules of this Court which stay discovery during the pendency of a motion to remand. Therefore, the parties are obligated to continue discovery until the remand is granted.

This 13th day of October, 1994.

SMOLAR, ROSEMAN, BRANTLEY
& SEIFTER

/s/ Yehuda Smolar
YEHUDA SMOLAR [By Thomas A. Rice]
Ga. State Bar No. 665150

/s/ James I. Seifter
JAMES I. SEIFTER [By Thomas A. Rice]
Ga. State Bar No. 636584

/s/ Thomas Allan Rice
THOMAS ALLAN RICE
Ga. State Bar No. 603400

Attorneys for Plaintiff
Linda Dagi

101 Marietta Tower
Suite 3410
Atlanta, Georgia 30303
(404) 525-3900

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing REPLY BRIEF IN SUPPORT OF MOTION TO REMAND on opposing counsel by placing a true and accurate copy of the same in the United Stated Mail with adequate postage affixed and addressed as follows:

Charles K. Reed, Esquire
LONG, WEINBERG, ANSLEY & WHEELER
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309

Charles A. Wiley, Jr., Esquire
Brian H. Alligood, Esquire
FAIN, MAJOR & WILEY, P.C.
50 Hurt Plaza
Suite 300 Hurt Building
Atlanta, Georgia 30303

This 13th day of October, 1994.

/s/ Thomas Allan Rice
THOMAS ALLAN RICE

Attorney for Plaintiff
Linda Dagi

EXHIBIT 23

ATTACHMENT "A"

COPY OF DECISION IN *Harmon v. BMW of North America, Inc.*, CASE NO. A94121003 IN THE COURT OF APPEALS OF GEORGIA

FIRST DIVISION
MCMURRAY, P. J., POPE, P. J., SMITH, J.

NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION to be deemed timely filed. (Court of Appeals Rules 4 and 37, January 1, 1995)

January 26, 1995
NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A94A2103. HARMON v. BMW OF NORTH AMERICA, INC. et al

SM-142

SMITH, Judge.

Appellant Richard Harmon brought suit against appellees BMW of North America, Inc., and Charles Evans BMW, Inc., for "intentional fraud and deceit based on the representation that the vehicle was a brand new vehicle," reckless misrepresentation, and suppression of material facts, for selling him a vehicle represented as new which in fact had been damaged by acid rain and repainted. The trial court, relying on this court's decision in *General Motors Corp. v. Green,* 173 Ga. App. 188 (325 SE2d 794) (1984), granted appellees' motion for summary judgment. This appeal followed.

We distinguished *Green*, supra, in *Rivers v. BMW of North America*, 214 Ga. App. 880 (449 SE2d 337) (1994), a

case involving a similarly situated plaintiff represented by the same counsel (in like fashion) as Harmon, which was prosecuted against these same appellees. Since appellees' brief suggests no factual or legal basis for distinguishing *Rivers*, and since we otherwise find none, we agree with Harmon that the trial court erred in granting appellees' motion for summary judgment.

Judgment reversed. McMurray, P. J., and Pope, P. J., concur.

BEST AVAI

EXHIBIT 24

DEAL # 3516

RETAIL BUYER'S ORDER

CHRIS MOTORS
1606 Church Street
Decatur, Georgia 30033
(404) 292-1400

Stock No. 9995
Date 04/02/92
Salesman SAM T MURRAY

Purchaser LINDA R. DAGI St. Address 2711 IRVIN WAY
Business (404)292-5010
City ATLANTA State GA County DEKALB Zip 30030 Telephone Home (404)843-1678

I or we (hereinafter referred to as Purchaser or Buyer) hereby agree to purchase from you under the terms and conditions specified, the following: ☐New ☐Used ☒Demo Year 91
Make BMW Body 4DR Model 535I Color ALPINE WHITE
VIN WBAHD1315MBF11537 Eng. Key No. MH120439 In service date 08/21/91 Mileage 5391

USED CAR TRADE-IN AND/OR OTHER CREDITS

MAKE OF TRADE-IN	MILEAGE	
YEAR MODEL	BODY	
MVI OR SERIAL NO.		
BALANCE OWED TO		
ADDRESS		
USED TRADE IN ALLOWANCE	$	NONE
BALANCE OWED ON TRADE-IN		NONE
LESS AD VALOREM TAX DUE ON TRADE-IN		NONE
NET ALLOWANCE ON USED TRADE-IN	$	NONE
DEPOSIT OR CREDIT BALANCE		NONE
DOWN PAYMENT (Trans.to Right Col.)	$	NONE

BASE PRICE	31121	95
FRONT HEATED SEATS	300	00
GAS GUZZLER TAX	1300	00
DEALER PREPARATION	175	00
DESTINATION/HANDLING	175	00
STRIPE,HATS,PROT. PKG.	500	00
BMW ALARM	561	00
SHEEPSKIN SEAT COVERS	396	95
DEALER SERVICE CHARGE	49	00
1. SELLING PRICE	$ 3474[illegible]	.00
2. TRADE ALLOWANCE		NONE
3. BUYER'S DIFFERENCE	$ 3470[illegible]	.00
4. SALES TAX $.00 %	173	.05
5. STATE INSPECTION FEE		NONE
6. TITLE		[illegible].00
7. LICENSE TAG (NEW OR TRANSFER)		[illegible].00
8. GA MV WARRANTY RIGHTS FEE		.00
9. SUB TOTAL	$ 3651	.95
10. BALANCE OWED ON TRADE		NONE
11. TOTAL DELIVERY PRICE	$ 3651	.95
12. DEPOSIT		NONE
13. DOWN PAYMENT		NONE
14. EXTENDED SERVICE AGREEMENT	101	.00
15.		
16. LUXURY EXCISE TAX	47	.19
17. BALANCE DUE ON DELIVERY	$ 3802	.14

UNLESS THE MANUFACTURER OR THE DEALER HAS ISSUED SPECIFIC WARRANTY ON THIS VEHICLE SEE THE DISCLAIMER OF WARRANTY ON THE BACK OF THIS CONTRACT (SEE SECTIONS 3, 6, 7 ON REVERSE)

PURCHASER'S CERTIFICATION

1. Purchaser certifies that the mileage as shown on the odometer on my trade-in is the correct mileage of the vehicle.

2. Purchaser agrees that this Agreement includes all of the terms and conditions on both the face and reverse side hereof, that this Agreement supersedes and supersedes any prior Agreement and as the date hereof comprises the complete and exclusive statement of the terms of the Agreement relating to the subject matters covered hereby. This Agreement cannot be modified except by express written Agreement of the parties. Purchaser by his execution of the Agreement acknowledges that he has read its terms and conditions and has received a true copy of the Agreement.

TRANSIT DAMAGE

3. Purchaser acknowledges that there may have been certain transit and/or storage damage to the vehicle sold by the Seller hereto, and Purchaser hereby releases the Seller for any and all claims arising out of such transit and/or storage.

KNOWN DEFECTS

4. All equipment including tires as appraised on my trade-in will remain, and the only existing material defects known to me on the motor vehicle that is being traded in to the dealer are _____; AND

IF NONE, SO STATE.

5. THIS IS A CASH SALE.

6. However, in the event any portion of the purchase price is financed, this Agreement and any subsequent retail installment contract or security agreement is subject to the conditions of said retail installment contract or security agreement by a bank or finance company.

7. NOTICE: IF YOU ARE BUYING A USED VEHICLE, SEE THE REVERSE SIDE UNDER "PROVISIONS APPLICABLE ON SALE OF A USED VEHICLE." BECAUSE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE DISCLAIMED AND CERTAIN STATEMENTS ARE MADE CONCERNING THE ODOMETER READING.

8. Purchaser acknowledges that the vehicle purchased from the dealer has a Federal Price Label on the vehicle pursuant to Public Law 88-376 if a new vehicle, or has a "Buyers Guide" affixed to a side window pursuant to 16 C.F.R. 455.2., if an used vehicle.

9. I certify that I am 18 years of age, or older, and that I have read the printed matter on the front and back hereof and agree to it as a part of this order the same as if it were printed above my signature.

I FURTHER ACKNOWLEDGE THIS ORDER SHALL NOT BECOME BINDING UNTIL ACCEPTED BY THE DEALER OR HIS AUTHORIZED REPRESENTATIVE.

IN THE EVENT THIS CONTRACT RELATES TO A NEW MOTOR VEHICLE PURCHASED BY A CONSUMER, AS DEFINED IN O.C.G.A. 10-1-782(2), PURCHASER ACKNOWLEDGES RECEIPT OF AN OWNER'S MANUAL, PUBLISHED BY THE MANUFACTURER OF SAID VEHICLE AND A WRITTEN STATEMENT THAT EXPLAINS THE CONSUMER'S RIGHTS PURSUANT TO O.C.G.A. 10-1-786(a) AND (b).

Linda R Dagi 372 73101 GA
Purchaser signature (sic), indicate driver's license # and state.

Co-Purchaser

ACCEPTED CHRIS MOTORS CORPORATION
DEALER
BY

IMPORTANT NOTICE TO BUYERS

PARAGRAPHS 6 AND 7 ON THE REVERSE SIDE OF THIS ORDER RELATE TO WARRANTY INFORMATION ON US
(THE BUYER/S MUST READ AND SIGN THE APPLICABLE PARAGRAPHS

PLAINTIFF'S EXHIBIT 12

ABLE COPY

NOTICE: LANGUAGE IN SECTION 3, SECTION 6 and SECTION 7 DISCLAIMING IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE ON VEHICLE WHICH IS SUBJECT OF THIS ORDER DOES NOT APPLY WHEN A SERVICE CONTRACT IS SOLD WITHIN 90 DAYS OF THE VEHICLE DATE OF SALE IN WHICH THE DEALER IS LEGALLY LIABLE UNDER THE SERVICE CONTRACT.

Provisions Applicable On Sale Of New Vehicle

1 PRICE REVISION: In the event the price to Dealer of the series and body type ordered by Purchaser is changed by the manufacturer prior to delivery to Purchaser of the vehicle order by Purchaser, Dealer has the right to accordingly change the cash delivered price to Purchaser provided that if Purchaser does not agree with such price change Purchaser may cancel this Purchase Order in which event if a used vehicle has been traded in as part of the consideration for the vehicle purchased by Purchaser such traded-in vehicle shall be returned to Purchaser upon payment of a reasonable charge for storage and repairs if any or if such traded-in vehicle has been previously sold by Dealer the amount received therefore less a selling commission of 15% and any expense for storing, insuring, conditioning or advertising such vehicle for sale shall be returned to Purchaser.

2 It is understood that there is no relationship of principal and agent between the dealer and the manufacturer and that the dealer is not authorized to act or attempt to act or represent himself directly or by implication as agent of the manufacturer or in any manner assume to create or attempt to assume to create any obligation on behalf of or in the name of the manufacturer.

3 THE ONLY WARRANTIES APPLYING TO THIS VEHICLE ARE THOSE OFFERED BY THE MANUFACTURER. THE SELLING DEALER HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES EITHER EXPRESS OR IMPLIED INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE AND NEITHER ASSUMES NOR AUTHORIZES ANY OTHER PERSON TO ASSUME FOR IT ANY LIABILITY IN CONNECT ON WITH THE SALE OF THE VEHICLE. BUYER SHALL NOT BE ENTITLED TO RECOVER FROM THE SELLING DEALER ANY CONSEQUENTIAL DAMAGES. DAMAGES TO PROPERTY. DAMAGES FOR LOSS OF USE LOSS OF TIME LOSS OF PROFITS OR INCOME OR ANY OTHER INCIDENTAL DAMAGES.

4 USED MOTOR VEHICLE BUYERS GUIDE. If you are buying a used vehicle with this contract federal regulations may require a special Buyers Guide to be displayed on the window of the vehicle. THE INFORMATION YOU SEE IN THE WINDOW FORM OF THIS VEHICLE IS PART OF THIS CONTRACT. INFORMATION ON THE WINDOW FORM OVERRIDES ANY CONTRARY PROVISIONS IN THE CONTRACT OF SALE.

Provisions Applicable On Sale Of A Used Vehicle

5 THE INFORMATION YOU SEE ON THE WINDOW FORM (BUYERS GUIDE) FOR THIS VEHICLE IS PART OF THIS CONTRACT. INFORMATION ON THE WINDOW FORM OVERRIDES ANY CONTRARY PROVISIONS IN THE CONTRACT OF SALE.

6 WITHOUT A WRITTEN DEALER'S WARRANTY

A. The vehicle described on the reverse of this page is being sold to you "AS IS" and "WITH ALL FAULTS" and THE SELLING DEALER HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES EITHER EXPRESS OR IMPLIED INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE and neither assumes nor authorizes any other person to assume for it any liability in connection with the sale of this vehicle. Further the undersigned acknowledges that he is not relying on any representations in purchasing this vehicle that may have been made by dealer or its agents or employees concerning the condition of the vehicle which are not stated herein. Purchaser shall not be entitled to recovery from the selling dealer for any consequential damages, incidental damages, property damage or damages for loss of use, loss of time, loss of profits, for inconvenience or loss of income. If selling dealer issues a written express warranty or there remains a part of the manufacturer's warranty which has not expired according to its terms, this provision does not apply.

B. The selling Dealer received this vehicle with approximately the mileage shown on the odometer (less miles driven for testing and demonstration). However selling Dealer makes no warranty or representation as to the accuracy of said odometer reading, either express or implied except that said odometer reading has not been altered by selling Dealer and that Dealer has no knowledge that it was altered or disconnected prior to the time this vehicle came into Dealer's possession. In consideration of the purchase price stated on the reverse side of this page, Purchaser hereby releases and forever discharges Dealer, its officers, directors, employees, agents, successors and assigns, from any and all claims, causes of action, liability and damages, which may result or develop from the accuracy of the odometer reading, and in the event that a claim is asserted against Dealer by a subsequent Purchaser of the vehicle based upon the accuracy of the odometer reading, Purchaser agrees to indemnify and hold harmless Dealer therefrom.

Purchaser understands that Dealer has no control over what may have been done to the odometer by previous owners, and that Dealer has no way to ascertain the correctness of the odometer reading. Dealer has offered to give to buyer the name of the individual or entity from whom Dealer purchased the vehicle and to provide Purchaser with information as to how he may contact the previous owners, and to ascertain from the Department of Revenue the mileage shown on the odometer on any previous transactions concerning this vehicle.

Purchaser acknowledges that he has read, understands and accepts all of the provisions of this disclaimer of warranty and release as set forth in paragraph 6.

Signature of Buyers _____ Date _____

7 WITH A DEALER'S WRITTEN WARRANTY

A. The only warranties applying to the sale of this vehicle are those extended by the manufacturer in an unexpired manufacturer's warranty (47, 50 or 6-8-0) and/or an express written limited warranty extended by selling Dealer and delivered to Purchaser at the time of delivery of this vehicle. The provisions and terms of such express written limited warranty are those set out in such instrument, and SELLING DEALER HEREBY EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES NOT CONTAINED THEREIN, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. Further, selling Dealer neither assumes nor authorizes any person to assume for it any liability other than that expressed in such instrument. The undersigned acknowledges that he is not relying on any representations in purchasing this vehicle that may have been made by Dealer or its agents or employees concerning the condition of the vehicle which are not stated herein. Purchaser's damages for the condition of the vehicle are limited and restricted to those which are recoverable under the terms of such express written limited warranty, and selling Dealer hereby disclaims and excludes liability for any damages not recoverable by Purchaser thereunder. If the vehicle is sold "as is" and "with all faults", this provision does not apply.

B. The selling Dealer received this vehicle with approximately the mileage shown on the odometer (less miles driven for testing and demonstration). However selling Dealer makes no warranty or representation as to the accuracy of said odometer reading, either express or implied except that said odometer reading has not been altered by selling Dealer and that Dealer has no knowledge that it was altered or disconnected prior to the time this vehicle came into Dealer's possession. In consideration of the purchase price stated on the reverse side of this page, Purchaser hereby releases and forever discharges Dealer, its officers, directors, employees, agents, successors and assigns, from any and all claims, causes of action, liability and damages, which may result or develop from the accuracy of the odometer reading, and in the event that a claim is asserted against Dealer by a subsequent Purchaser of this vehicle based upon the accuracy of the odometer reading, Purchaser agrees to indemnify and hold harmless Dealer therefrom.

Purchaser understands that Dealer has no control over what may have been done to the odometer by previous owners, and that Dealer has no way to ascertain the correctness of the odometer reading. Dealer has offered to give to buyer the name of the individual or entity from whom Dealer purchased the vehicle and to provide Purchaser with information as to how he may contact the previous owners, and to ascertain from the Department of Revenue the mileage shown on the odometer on any previous transactions concerning this vehicle.

Purchaser acknowledges that he has read, understands and accepts all of the provisions of this disclaimer of warranty and release as set forth in paragraph 7.

Signature of Buyers _____ Date _____

Other Provisions

8 NOTIFY SELLER WITHIN 20 DAYS. Purchaser shall give notice to seller of any breach of contract or breach of express or implied warranty applicable to the goods within twenty (20) days of the time he discovers or should have discovered the said breach or the Purchaser shall be barred from any remedy for the breach. Purchaser shall thereafter return the goods to seller or anyone designated by seller within twenty (20) days after the notice of breach to allow the seller the opportunity to cure the breach or the Purchaser shall be barred from any remedy for the breach.

9 REAPPRAISAL OF TRADE-IN VEHICLE. If a vehicle has been traded in as a part of the consideration for the vehicle ordered by Purchaser hereunder and such vehicle is not delivered to Dealer until delivery to Purchaser of the vehicle ordered by Purchaser, such trade-in vehicle shall be reappraised at that time and such reappraisal value shall determine the allowance made for such vehicle. If such reappraised value is lower than the original allowance therefor shown on the face of this Purchase Order, Purchaser may, if dissatisfied therewith, cancel this Purchase Order, provided however, that such right to cancel is exercised prior to delivery of the vehicle ordered hereunder to the Purchaser and surrender of the traded-in vehicle to Dealer.

10 PURCHASER'S WARRANTY OF TITLE AND PROMPT DELIVERY OF TITLE. Purchaser warrants that the traded-in vehicle is his property free and clear of all liens and encumbrances except as otherwise noted on the title. Purchaser understands that the delivery and assignment of the certificate of title to any trade-in vehicle is an integral part of the entire sale transaction expressed in the retail buyer's order. If Purchaser does not simultaneously assign and deliver the certificate of title at the time of trade-in or fails to do so within the (5) days of the trade-in sale, may (1) cancel the sale/purchase order and exercise any and all remedies under law including repossession or (2) treat the sale in any respect as if no trade-in took place and revise the purchase price for the ordered vehicle accordingly. In such cases, Purchaser's trade-in will be returned upon payment of a reasonable charge for storage and repairs, if any.

11 FAILURE OR REFUSAL TO ACCEPT DELIVERY. Unless the Purchase Order shall have been cancelled by Purchaser under and in accordance with the provisions of paragraphs 1 or 9 above, Dealer shall have the right upon failure or refusal of Purchaser to accept delivery of the vehicle ordered and to comply with the terms of the Purchase Order to retain as liquidated damages any cash deposit made by the Purchaser, and in the event a vehicle has been traded in as a part of the consideration for the vehicle ordered by Purchaser hereunder to sell such trade-in vehicle and reimburse himself with the proceeds of such sale for the expenses specified in paragraph 11 above and for such other expenses and losses as Dealer may incur or suffer as a result of such failure or refusal by Purchaser.

12 FAILURE OR DELAY OF DELIVERY. Dealer shall not be liable for failure to deliver or delay in delivery of the vehicle accessories or other parts thereof covered by the Purchaser Order where such failure or delay is due, in whole or in part, to any cause other than the negligence of the Dealer.

EXHIBIT 25

BUYERS GUIDE

IMPORTANT: Spoken promises are difficult to enforce. Ask the dealer to put all promises in writing. Keep this form.

BMW (VEHICLE MAKE) 535I (MODEL) 1991 (YEAR) WBAHD1315MBF11537 (VIN NUMBER)

9995 (DEALER STOCK NUMBER (OPTIONAL))

WARRANTIES FOR THIS VEHICLE:

☑ **AS IS-NO WARRANTY**

YOU WILL PAY ALL COSTS FOR ANY REPAIRS. The dealer assumes no responsibility for any repairs regardless of any oral statements about the vehicle.

☐ **WARRANTY**

☐ FULL ☐ LIMITED WARRANTY. The dealer will pay _____% of the labor and _____% of the parts for the covered systems that fail during the warranty period. Ask the dealer for a copy of the warranty document for a full explanation of warranty coverage, exclusions, and the dealer's repair obligations. Under state law, "implied warranties" may give you even more rights.

SYSTEMS COVERED:	DURATION:
MANUFACTURER'S original warranty is in effect on the vehicle. Consult the manufacturer's warrant, booklet for details as to warranty coverage, service location, etc.	

☑ SERVICE CONTRACT. A service contract is available at an extra charge on this vehicle. Ask for details as to coverage, deductible, price, and exclusions. If you buy a service contract within 90 days of the time of sale, state law "implied warranties" may give you additional rights.

PRE PURCHASE INSPECTION: ASK THE DEALER IF YOU MAY HAVE THIS VEHICLE INSPECTED BY YOUR MECHANIC EITHER ON OR OFF THE LOT.

SEE THE BACK OF THIS FORM for important additional information, including a list of some major defects that may occur in used motor vehicles.

MOOPE®

MOOPE®

EXHIBIT 26

LINDA R. DAGI — 9995

CUSTOMER'S NAME — STOCK NO.

ODOMETER DISCLOSURE STATEMENT

Federal law (and State law, if applicable) requires that you state the mileage upon transfer of ownership. Failure to complete or providing a f... - statement may result in fines and/or imprisonment.

I, CHRIS MOTORS CORPORATION (transferor's name, Print)

state that the odometer now reads 005391 (no tenths) miles and to the best of my knowledge that it reflects the actual mileage of the vehicle described below, unless one of the following statements is checked.

☐ (1) I hereby certify that to the best of my knowledge the odometer reading reflects the amount of mileage in excess of its mechanical limits.

☐ (2) I hereby certify that the odometer reading is NOT the actual mileage.

WARNING - ODOMETER DISCREPANCY.

MAKE	MODEL	BODY TYPE
BMW	535I	4DR

VEHICLE IDENTIFICATION NUMBER	YEAR
WBAHD1315MBF11537	91

X _____
TRANSFEROR'S SIGNATURE

E.W. SWEENEY III
PRINTED NAME

1606 CHURCH ST.
TRANSFEROR'S ADDRESS (STREET)

DECATUR GA 30033
CITY — STATE — ZIP CODE

04/02/92
DATE OF STATEMENT

X _____
TRANSFEREE'S SIGNATURE

LINDA R. DAGI
PRINTED NAME

LINDA R. DAGI
TRANSFEREE'S NAME

2711 LIRVIN WAY
TRANSFEREE'S ADDRESS (STREET)

ATLANTA GA 30030
CITY — STATE — ZIP CODE

Plaintiff's Exhibit 2

EXHIBIT 27

MV-1|REV. 11/89| (Original or Replacement Application)

[redacted]

WBAHD1315MBF11537

BMW | 91 | 4DR | W0597364'2 CBX 892

535I

6 | 4/02/92

5.00

1.00

6.00

USAA

251 55 49U 71050

G | N | 5391 | MSO

Dagi, Linda R.

2711 Irvin Way Suite 203

Decatur, GA 30030 | DeKalb | 02

E3995829 | 1/10/92

X Linda R Dagi 4/2/92

Chris Motors Corp

1606 Church ST

Decatur, GA 30033 | DeKalb | 02

none

3384 | X Chris Motors Corp

X Sherri D. Smith

PLEASE DO NOT SEND CASH—SEND CHECK OR MONEY ORDER
ALL TAG AND TITLE APPLICATIONS (EXCEPT THE SIGNATURE) MUST BE TYPED

PLAINTIFF'S EXHIBIT 3

EXHIBIT 28

DISTRIBUTOR OR DEALER ASSIGNMENT NUMBER(S)

FOR VALUE RECEIVED, I THE UNDERSIGNED TRANSFER THE VEHICLE DESCRIBED ON THE FACE OF THIS CERTIFICATE TO

NAME OF PURCHASER(S) Linda R. DAgi

ADDRESS 2711 Irwin Way, Suite 203, Decatur, GA 30030

AND CERTIFY TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF UNDER PENALTY OF LAW THAT THE VEHICLE IS NEW AND HAS NOT BEEN REGISTERED IN THIS OR ANY STATE AND AT THE TIME OF DELIVERY THE VEHICLE WAS SUBJECT TO THE FOLLOWING SECURITY INTERESTS AND NONE OTHER AND WARRANT TITLE TO THE VEHICLE.

FEDERAL REGULATIONS REQUIRE YOU TO STATE THE ODOMETER MILEAGE UPON TRANSFER OF OWNERSHIP

I certify to the best of my knowledge that the odometer reading is 5391 and reflects the actual mileage of the vehicle unless one of the following statements is checked ☐ 1 The odometer was not the actual mileage ☐ 2 The odometer reading is not the actual mileage

AMOUNT OF LIEN	DATE OF LIEN	KIND OF LIEN	IN FAVOR OF
none			

LIENHOLDER'S ADDRESS

DEALER Chris Motors Corp 3384 BY: Sharon A Swizk T/C

(Name of Dealership) (Dealer's License No.) (Authorized Signature of Dealer) (Title of Person)

State of Ga

County of DeKalb

Being duly sworn upon oath says that the statements set forth are true and correct. Subscribed and sworn to me before me this 2nd day of Apr, 19 92

(Notary Public) (Notary Seal)

USE NOTARIZATION ONLY IF REQUIRED IN TITLING JURISDICTION

DISTRIBUTOR OR DEALER ASSIGNMENT NUMBER(S)

FOR VALUE RECEIVED, I THE UNDERSIGNED TRANSFER THE VEHICLE DESCRIBED ON THE FACE OF THIS CERTIFICATE TO

NAME OF PURCHASER(S)

ADDRESS

AND CERTIFY TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF UNDER PENALTY OF LAW THAT THE VEHICLE IS NEW AND HAS NOT BEEN REGISTERED IN THIS OR ANY STATE AND AT THE TIME OF DELIVERY THE VEHICLE WAS SUBJECT TO THE FOLLOWING SECURITY INTERESTS AND NONE OTHER AND WARRANT TITLE TO THE VEHICLE.

FEDERAL REGULATIONS REQUIRE YOU TO STATE THE ODOMETER MILEAGE UPON TRANSFER OF OWNERSHIP

I certify to the best of my knowledge that the odometer reading is _____ and reflects the actual mileage of the vehicle unless one of the following statements is checked ☐ 1 The odometer was not the actual mileage ☐ 2 The odometer reading is not the actual mileage

AMOUNT OF LIEN	DATE OF LIEN	KIND OF LIEN	IN FAVOR OF

LIENHOLDER'S ADDRESS

DEALER _____ BY: _____

(Name of Dealership) (Dealer's License No.) (Authorized Signature of Dealer) (Title of Person)

State of _____

County of _____

Being duly sworn upon oath says that the statements set forth are true and correct. Subscribed and sworn to me before me this _____ day of _____, 19 ____

(Notary Public) (Notary Seal)

USE NOTARIZATION ONLY IF REQUIRED IN TITLING JURISDICTION

DISTRIBUTOR OR DEALER ASSIGNMENT NUMBER(S)

FOR VALUE RECEIVED, I THE UNDERSIGNED TRANSFER THE VEHICLE DESCRIBED ON THE FACE OF THIS CERTIFICATE TO

NAME OF PURCHASER(S)

ADDRESS

AND CERTIFY TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF UNDER PENALTY OF LAW THAT THE VEHICLE IS NEW AND HAS NOT BEEN REGISTERED IN THIS OR ANY STATE AND AT THE TIME OF DELIVERY THE VEHICLE WAS SUBJECT TO THE FOLLOWING SECURITY INTERESTS AND NONE OTHER AND WARRANT TITLE TO THE VEHICLE.

FEDERAL REGULATIONS REQUIRE YOU TO STATE THE ODOMETER MILEAGE UPON TRANSFER OF OWNERSHIP

I certify to the best of my knowledge that the odometer reading is _____ and reflects the actual mileage of the vehicle unless one of the following statements is checked ☐ 1 The odometer was not the actual mileage ☐ 2 The odometer reading is not the actual mileage

AMOUNT OF LIEN	DATE OF LIEN	KIND OF LIEN	IN FAVOR OF

LIENHOLDER'S ADDRESS

DEALER _____ BY: _____

(Name of Dealership) (Dealer's License No.) (Authorized Signature of Dealer) (Title of Person)

State of _____

County of _____

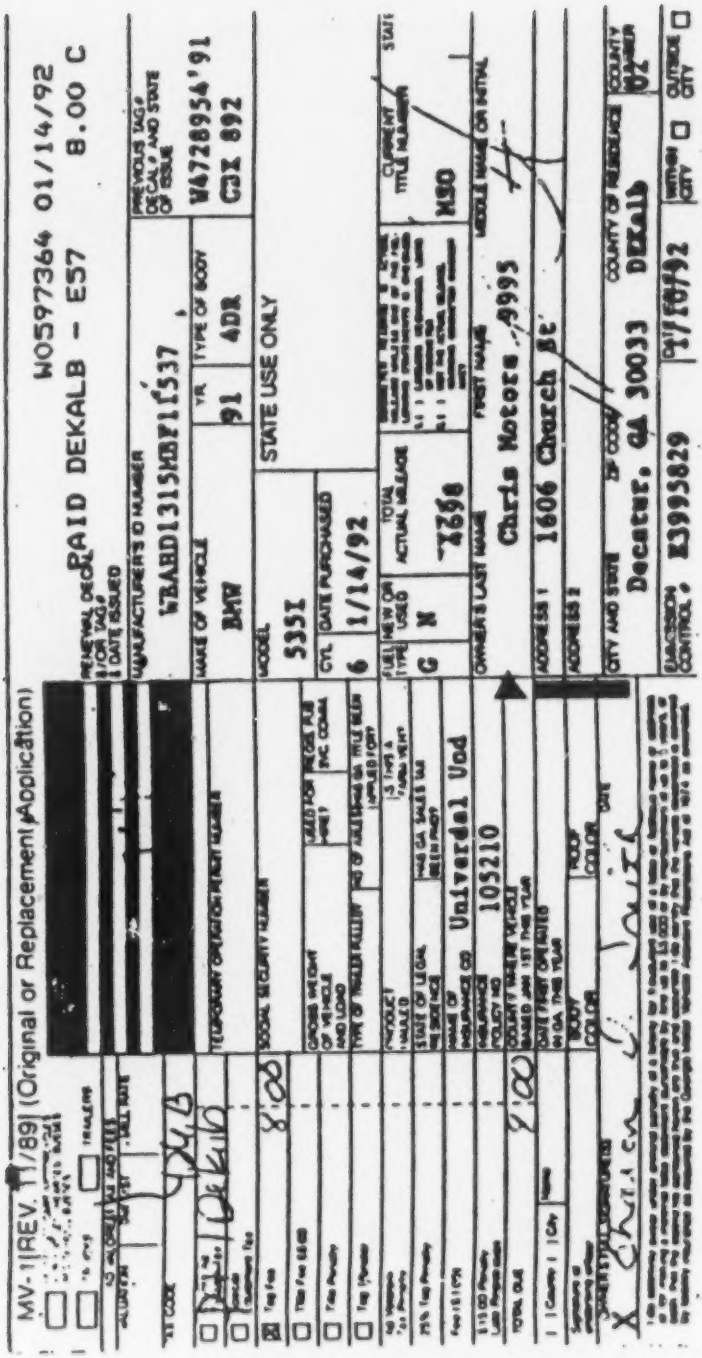
Being duly sworn upon oath says that the statements set forth are true and correct. Subscribed and sworn to me before me this _____ day of _____, 19 ____

(Notary Public) (Notary Seal)

USE NOTARIZATION ONLY IF REQUIRED IN TITLING JURISDICTION

PLAINTIFF'S EXHIBIT 4

EXHIBIT 29



Plaintiff's Exhibit 5

EXHIBIT 30

86-7

EXHIBIT 31

86-9

EXHIBIT 32

VIRGINIA SMITH
5505 W. CYPRESS
TAMPA FL 33607

Date: 13-NOV-92 035

Make:BMW Model:535 Year:1991
Campaign No: 92V101000 Mfg Campaign No.: No. Recalled: 637
Built from 1991MAR to 1991APR Notification Date:

SYSTEM: THROTTLE:
VEHICLE DESCRIPTION: PASSENGER CARS.
DESCRIPTION OF DEFECT: SOME OF THESE VEHICLES ARE EQUIPPED WITH A THROTTLE HOUSING ON WHICH THE THROTTLE VALVE SHAFT RETAINING NUT WAS NOT SUFFICIENTLY TIGHTENED.
CONSEQUENCE OF DEFECT: IF THE NUT WERE TO LOOSEN, MOVEMENT OF THE THROTTLE VALVE COULD BE IMPAIRED, RESULTING IN THE VEHICLE BEING UNABLE TO DECELERATE WHEN THE GAS PEDAL IS RELEASED.
CORRECTIVE ACTION: THOSE THROTTLE HOUSINGS WITH SUSPECT MANUFACTURING CODES WILL HAVE THE THROTTLE VALVE SHIFT RETAINING NUT TORQUE TESTED, AND THOSE WITH INSUFFICIENT NUT TORQUE WILL BE REPLACED.

ATTACHMENT "D"
DOCUMENT PERTAINING TO RECALL ON THROTTLE HOUSING UNIT ON 1991 BMW 535 AUTOMOBILES
PLAINTIFF'S EXHIBIT 62

BEST AVAI

EXHIBIT 33

THE WAGGONERS TRUCKING

STRAIGHT BILL OF LADING

COM#

DATE OF ORDER: 2 2 7 4 1

BILLINGS
5220 Midland Rd.
Billings, MT 59107
(406) 248-1919

SALT LAKE CITY
760 South 5600 West
Salt Lake City, UT 84104
(801) 355-5621

SOUTHERN CALIFORNIA
15732 Bovie Ave
Fontana, CA 92335
(714) 829-8686

REMIT TO:
Box 31357
Billings, MT 59107

SHIPPER:	CONSIGNEE:	BILL TO:
BMW OF NORTH AMERICA	CURTIS MOTORS CORP	BMW OF NORTH AMERICA
106 JOE FRANK HARRIS BLVD	1606 CHURCH STREET	C/O BTS SERVICES
BRUNSWICK, GA	decatur,ga 30033	P. O. BOX 221
		GLADSTONE, NJ 07934

	YEAR	MAKE	MODEL	COLOR	LIC #	VIN # (LAST 3)	CONTROL #	RATE
1.	1991	BMW	325ic	brll red		WBC25621	7000	
2.	1991	BMW	325ic	alpine/[illegible]		WBC25126	8005	
3.	1991	BMW	325ia	cashmere		WBC56827	7993	
4.	1991	BMW	318ic	schwarz		WBC11270	9001	
5.	1991	BMW	535i	alpine		WBF11517	7005	
6.	1991	BMW	535ia	ice grn		WBJ62697	7996	
7.	1991	BMW	525tx 318i	brll red		WBJ05387	7004	
8.								
9.								
10.								
11.								

DATE LOADED: _____

DATE OF ETA: _____

LOADED MILES: _____

EMPTY MILES: _____

TOTAL MILES: _____

SPECIAL INFO: BC25621 E70587 2K2697
BT 11270 3E 11517 911
Rain acid damage

SPECIAL CHARGES:

IN-OP FEES:

TOTAL CHARGES:

PLAINTIFF'S EXHIBIT 85

TRUCK # 60 2251 TRAILER # 26-C-46 DRIVER J. GUERY

TRUCK # TRAILER # DRIVER

IMPORTANT – NO SHIPPER: Our Interstate Commerce Commission Permit No. MC2476 limits service to the transportation of the vehicle only. We MAY NOT accept any PERSONAL EFFECTS inside the vehicle or trunk area. This regulation cannot be waived.

Subject to Section 7 of Conditions of applicable bill of lading, if the shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. NOTE-UNLESS A HIGHER VALUE IS DECLARED, CARRIER'S LIABILITY SHALL BE LIMITED TO AN AMOUNT NOT EXCEEDING $25,000.00 PER UNIT. _____ NO _____

Signature of consignor.

If charges are to be prepaid, write or stamp here, "To be Prepaid."

EXCEPTIONS FOR DAMAGE OR SHORTAGES AT TIME OF DELIVERY MUST BE NOTED ON DELIVERY RECEIPT. CLAIM RESULTING THEREFORE MUST BE IN WRITING TO:

The Waggoners Trucking, P.O. Box 31357, Billings, MT 59107

THE CONSIGNEE HAS RECEIVED ABOVE LISTED VEHICLE WITH NO TRANSPORTATION DAMAGES NOTED, OR HAS MADE SUCH EXCEPTIONS ON INSPECTION SHEETS.

DATE OF DELIVERY: 8-29-91

INSPECTED BY: _____

NOTE: THE WAGGONERS TRUCKING WILL NOT BE LIABLE FOR THE FOLLOWING:

1. DAMAGE CAUSED BY FLAMES, HEATED AIR, SMOKE, GASES OR STEAM FROM HEATED SOURCES, INCLUDING HEATING OF VEHICLE BY, OR FROM, ACTS OF GOD.
2. AIRCRAFT NOT INVOLVED.
3. DAMAGE OR LOSS OF LOOSE PARTS OR SPECIAL EQUIPMENT WHICH NOT LISTED ON THE BILL OF LADING WHOSE WEIGHT IS NOT PROPERLY SUPPORTED AND BOLTED SO AS TO PREVENT LOSS OR DAMAGE.
4. MECHANICAL, ELECTRICAL, HYDRAULIC, AIR-RIDE, SUSPENSION OR TUNING OF ENGINE BECAUSE INSPECTION OF THESE ITEMS IS NOT PRACTICAL AT TIME OF SHIPMENT.
5. AUTO GENERAL ACCESSORIES NOT STANDARD.
6. DAMAGE CAUSED BY FREEZING OF COOLING SYSTEM UNLESS ANTIFREEZE PROTECTION FROM FREEZING WILL BE ADVISED OF AND AT THE EXPENSE OF THE SHIPPER.

C.O.D.

COLLECTION ON DELIVERY

$ _____

AND FEES IF APPLIES.

C.O.D. CHARGES TO BE PAID BY

SHIPPER CONSIGNEE

PLEASE NOTE:

PAYMENT BY CERTIFIED CHECK

PAYMENT BY CASH OR CERTIFIED CHECK ONLY—NO EXCHANGES

ATTACHMENT "E"
STRAIGHT BILL OF LADING WITH NOTATION OF ACID
RAIN DAMAGE TO THE SUBJECT BMW AUTOMOBILE
PLAINTIFF'S EXHIBIT 85

LABLE COPY

FILED
MAY 27 1997
OFFICE OF THE CLERK

No. 96-1696

In The

Supreme Court of the United States

October Term, 1996

LINDA DAGI,

Petitioner,

vs.

CHRIS MOTORS CORPORATION, BAYERISCHE MOTOREN WERKE, A.G. and BMW OF NORTH AMERICA, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CHRIS MOTORS CORPORATION

CHARLES A. WILEY, JR.
Counsel of Record
BRIAN H. ALLIGOOD
FAIN, MAJOR & WILEY, P.C.
Attorneys for Respondent Chris Motors Corporation
300 The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303
(404) 688-6633

71205 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

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STATEMENT OF THE CASE

Respondent respectfully opposes the petition for writ of certiorari because the petition raises no unsettled question of federal law. Indeed, as the petition itself reflects, the sole substantive question of federal law identified pertains to federal removal jurisdiction. This particular issue, contrary to petitioner's contention, has been firmly settled by prior Supreme Court precedent, which was appropriately followed by the courts below.

In an effort to embellish her federal jurisdiction argument, petitioner misleads the Court by omitting and carefully avoiding any reference to her third amended complaint, which is the amended pleading that first triggered federal jurisdiction. Because the petitioner's statement is thus incomplete and misleading, respondent below summarizes the full case history and, thereafter, underscores the principal factual deceptions employed by petitioner in seeking to deceive the Court into reviewing a case that raises no meaningful federal question of law.

A. Course of Proceedings and Disposition Below

Petitioner first filed this action in the State Court of Fulton County, Georgia on March 19, 1993 as the result of a minor automobile accident in which petitioner drove her BMW automobile into the rear of another vehicle during rush hour traffic. In the suit petitioner sought to recover property and punitive damages from the manufacturer, distributor, and retailer of a BMW automobile.

The complaint, as initially filed, asserted state law tort claims exclusively. (App. to Petition 92a-100a). First, because petitioner was admittedly uninjured in her accident, she sought

to recover for property damage sustained by her BMW automobile under Georgia state law theories of negligence and product liability. (*Id.* at 95a-97a). She additionally sought damages under a state common law fraud theory, which was predicated upon her belief that the vehicle's mileage was misrepresented prior to her purchase of the car. (*Id.* at 97a-100a). All theories of recovery set forth in the initial complaint are cast beneath conspicuous and plainly worded state law headings, and the entire complaint avoids any reference to federal law. (*Id.* at 92a-100a).

Petitioner subsequently filed a series of amended complaints, which culminated in the filing of a third amended complaint for damages on July 18, 1994. (A copy of the Third Amended Complaint for Damages is attached hereto as Appendix A). In this amended complaint, petitioner, for the first time in the litigation, asserted a cause of action under the federal Motor Vehicle Cost Savings and Information Act, 49 U.S.C. § 32710 *et seq.* (*Id.* at 13a).

By virtue of this newly-added federal cause of action, a basis for federal jurisdiction was first created. In response, the respondents, pursuant to 28 U.S.C. § 1446(b), removed the action to United States District Court on August 12, 1994, within thirty days of service of the third amended complaint. (App. to Petition 103a). In a motion to remand, petitioner contended that the removal was untimely because the original complaint set forth general allegations from which a federal cause of action could have been based. (R3-5). However, because no federal cause of action was in fact pursued by petitioner until the filing of her third amended complaint, the district court denied the motion on October 24, 1994. (App. to Petition 25a).

Following the close of formal discovery, the respondents separately moved for summary judgment on a variety of legal

grounds. The district court granted the motions in two thorough and comprehensive orders dated July 31, 1995 and November 30, 1995. (Copies of both orders included in petitioner's appendix at 26a and 91a). Both rulings were affirmed by the Eleventh Circuit Court of Appeals. (App. to Petition 13a).

Petitioner now seeks United States Supreme Court review of her automobile property damage and fraud action.

B. Correction of Misstatements in the Petition

The underlying facts of the case are set forth in detail in the district court order on respondent Chris Motors Corporation's motion for summary judgment, a copy of which is contained in the appendix to the petition at 26a. In the interest of brevity, respondent adopts and incorporates this fact statement fully herein.

In addition, pursuant to United States Supreme Court Rule 15.1, respondent emphasizes to the Court a central misrepresentation that runs throughout the petition for writ of certiorari. Specifically, in her brief petitioner deliberately omits any reference to her third amended complaint, which, as explained above, first set forth the basis for federal jurisdiction. In her statement of the case, petitioner merely explains that the action was removed by the respondents sixteen months into the litigation and, by avoiding reference to the third amended complaint, suggests that there was no precipitating basis for the removal at that time. (Petition at 10).

As remarked above, and as will be further discussed below, the action was not removable until the federal cause of action was first asserted in the third amended complaint. Respondent takes strong exception to petitioner's attempt to deceive the Court on this issue by failing to acknowledge the effect, or even the

existence, of her third amended complaint. Respondent respectfully submits that this clarification will enable the Court to make properly short work of the jurisdiction issue.

REASONS FOR DENYING THE WRIT

Of the five issues raised in the petition, only the first, which challenges the existence of federal jurisdiction, raises a genuine, though certainly not new, issue of federal law. Accordingly, respondent devotes the bulk of this response to demonstrating that this issue has been firmly settled by earlier precedents of this Court. Thereafter, respondent addresses briefly the remaining issues raised.

I.

THE FEDERAL JURISDICTION ISSUE RAISED BY PETITIONER IS GOVERNED BY PRIOR PRECEDENT OF THIS COURT, WHICH WAS CORRECTLY APPLIED BY THE COURTS BELOW.

Petitioner's lead argument that certiorari should be granted in order to reverse the denial of petitioner's motion to remand is without merit because the position advocated has been flatly rejected by prior precedent of this Court. Petitioner's position that removal was untimely is premised on her contention that federal question jurisdiction existed at the time the initial complaint was filed because the allegations of the fraud count could also have supported an alternative claim under the Motor Vehicle Cost Savings and Information Act. 49 U.S.C. § 32710 *et seq.* The Supreme Court's prior precedents discussed below make plain that this position is devoid of merit.

In uniform jurisprudence spanning nearly a full century, this Court has mandated that federal question jurisdiction exists

only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). *See also Louisville & Nashville Railroad v. Mottley*, 211 U.S. 149 (1908). Known as the well-pleaded complaint rule, the doctrine makes a plaintiff the master of the complaint, *Lister v. Starke*, 890 F.2d 941, 943 (7th Cir. 1989), *cert. denied*, 498 U.S. 1011 (1990), and empowers plaintiffs to "avoid jurisdiction by exclusive reliance on state law." *Caterpillar*, 482 U.S. at 392. From these and other Supreme Court precedents it has become settled law that "[j]urisdiction may not be sustained on a theory that the Plaintiff has not advanced." *Merrell Dowell Pharmaceutical, Inc. v. Thompson*, 478 U.S. 804, 809, n. 6 (1986).

There are only two exceptions to the well-pleaded complaint rule, neither of which arise in this case. First, where the plaintiff relies upon state law that is completely preempted by federal law, federal jurisdiction nonetheless exists. *See, e.g., Avco Corp. v. Machinists*, 390 U.S. 557 (1968). Second, a plaintiff may not avoid federal jurisdiction by deliberately omitting to plead a necessary federal question in the complaint. *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1 (1983).

Under the foregoing authority, federal question jurisdiction did not exist under the initial complaint, and the case was not removable until the federal claim first appeared in the third amended complaint. As the initial complaint reflects, petitioner carefully avoided any reference to federal law. (App. to Petition 92a-100a). Indeed, the initial complaint specifically enumerated with conspicuous headings the particular state law theories under which recovery was sought. (*Id.*) Consequently, under the well-pleaded complaint rule, the respondents were initially powerless to remove the case to federal court. Furthermore, neither exception to the well-pleaded complaint rule applied. The pertinent federal act itself provides that it shall not preempt state

law, 49 U.S.C. § 32711, and the federal law is not an essential ingredient to any of the initially pleaded state law claims. For all of these reasons, the initial complaint was not removable, and the district court properly denied the motion to remand.

Despite the extensive Supreme Court authority set forth above, petitioner continues to insist that the respondents should have removed the case upon the filing of the initial complaint because it was apparent from her fraud allegations that a federal action *could* have been asserted as well. As demonstrated above, the lack of merit to this position has previously been established by this Court, and numerous district court opinions following the rule only further confirm the level of judicial certainty on this issue. *See, e.g., Matthews v. Anderson*, 826 F. Supp. 479 (M.D. Ga. 1993); *Barraclough v. ADP Automotive Claims Services*, 818 F. Supp. 1310 (N.D. Cal. 1993); *Woolridge v. Redman Homes, Inc.*, 792 F. Supp. 1469 (N.D. Tex. 1991). *See also Chronologic Simulation, Inc. v. Sanguinetti*, 892 F. Supp. 318 (D. Mass. 1995); *Crawford v. Mokhtari*, 842 F. Supp. 840 (D. Md. 1994), *aff'd*, 30 F.3d 129 (4th Cir. 1994); *Moak v. Illinois Central Railroad Co.*, 807 F. Supp. 34 (M.D. La. 1992); *Cedillo v. Valcar Enterprises*, 773 F. Supp. 932 (N.D. Tex. 1991).

As was the case in each of the above cases, the mere fact that petitioner *could have* pursued a federal claim at the time of her initial complaint does not suggest that the defendants could then have removed the action. To the contrary, since petitioner presented only state claims in the initial complaint, the case was not removable until the federal claim was added.

In contrast to the applicable authority set forth above, petitioner cites the Court to distinguishable and dated district court cases having no relevance to the issue raised. For instance, petitioner cites *Gable v. Local Union #387 Int'l Ass'n*, 695 F. Supp. 1174 (N.D. Ga. 1988) and *Golke v. Lee Lumber & Building*

Materials Corp., 671 F. Supp. 568 (N.D. Ill. 1987). These cases concern state law claims preempted by the Labor Management Relations Act. As such, both fall within the preemption exception to the well-pleaded complaint rule. As remarked above, the instant case does not involve federal preemption, and the pertinent federal legislation expressly so holds. 49 U.S.C. § 32711. Consequently, neither case alters the relevant analysis. Similar substantive distinctions apply to the more dated district court opinions cited by petitioner.

In short, under the extensive federal authority set forth above, the motion to remand was properly denied. The clarity of the controlling rule and the consistency of its case law make further review of this argument unnecessary. Respondent respectfully submits that this Court need not devote its valuable resources toward revisiting this previously settled rule of law.

II.

ALL REMAINING REASONS ENUMERATED IN THE PETITION ARE INAPPROPRIATE FOR REVIEW BY THIS COURT.

The remaining four grounds articulated by petitioner as purported support for a writ of certiorari are simply unworthy of serious consideration by this Court. In the remaining grounds petitioner asks the Court to review record evidence and to review the Eleventh Circuit Court of Appeals's denial of oral argument in reviewing the initial appeal. Respondent respectfully submits that these issues are simply inappropriate for Supreme Court review for several reasons.

First, with respect to petitioner's suggestion that this Court review the evidentiary record to determine if summary judgments were proper granted, the Court has long recognized its refusal

to review evidence or to discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925). Certainly the instant case, which features a claim for property damage resulting from a rear-end automobile collision caused by the petitioner herself, does not merit departure from this general principle. Furthermore, the summary judgment rulings below almost exclusively address Georgia substantive law issues. This Court traditionally eschews review of state law rulings and limits its jurisdiction "to the correction of errors relating solely to federal law." *Murdock v. City of Memphis*, 87 U.S. 590 (1875). A review of the petitioner's negligence, fraud, and product liability claims would, again, deviate from sound Supreme Court principles and time-honored precedent.

As for the petitioner's suggestion that the Court should grant certiorari for the purpose of reviewing the denial of oral argument in the court below, respondent again submits that this Court's resources are worthy of more weighty substantive matters.

Finally, respondent respectfully submits that the additional issues identified in the petition are of insufficient importance to merit review by this Court. The Supreme Court's Rules specifically state: "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10. Though petitioner seemingly feels entitled to a further review of factual state law issues, such is plainly not the case. The present case — which arises from a minor traffic accident, which involves no constitutional issue, and which, at best, raises questions regarding the sufficiency of evidence to support a claim — neither commands nor merits Supreme Court review.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

CHARLES A. WILEY, JR.
Counsel of Record
BRIAN H. ALLIGOOD
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APPENDIX A — THIRD AMENDED COMPLAINT FOR DAMAGES DATED JULY 18, 1994

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

CIVIL ACTION

FILE NO. 93-VS-0070409-F

JURY TRIAL DEMANDED

LINDA DAGI,

Plaintiff,

vs.

BAYERISCHE MOTOREN WERKE, A.G., BMW OF NORTH AMERICA, INC. and CHRIS MOTORS CORPORATION,

Defendants.

THIRD AMENDED COMPLAINT FOR DAMAGES

COMES NOW Linda Dagi Plaintiff in the above-styled action and prior to the entry of the Pre-Trial Order in this case and pursuant to the provisions of O.C.G.A. § 9-11-15, hereby files and serves this her Amended Complaint for Damages by showing the Court as follows:

Appendix A

PARTIES

1.

Plaintiff Linda Dagi (hereinafter referred to as "Dagi") is and at all times material to this action, was a resident of the State of Georgia.

2.

Defendant Bayerische Motoren Werke, A.G. (hereinafter referred to as "BMW") is a foreign corporation engaged in the business of manufacturing motor vehicles.

3.

At all times relevant hereto, Defendant BMW transacted business in the State of Georgia.

4.

Defendant BMW may be served through the Hague Convention at its corporate headquarters in Munich, Germany.

5.

Defendant BMW is subject to both the jurisdiction and venue of this Court.

6.

Defendant BMW of North America, Inc. (hereinafter referred to as "BMW of North America") is a foreign corporation engaged in the business of distributing BMW motor vehicles.

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7.

At all times relevant hereto, Defendant BMW of North America transacted business in the State of Georgia.

8.

Defendant BMW of North America may be served through its registered agent, to-wit: CT Corporation System, 1201 Peachtree Street, N.E., Atlanta, Fulton County, Georgia 30361.

9.

Defendant BMW of North America is subject to both the jurisdiction and venue of this Court.

10.

Defendant Chris Motors Corporation (hereinafter referred to as "Chris Motors") is a Georgia Corporation engaged in the business of the retail sale of BMW and other motor vehicle products.

11.

At all times material hereto Defendant Chris Motors transacted business in the State of Georgia.

12.

Defendant Chris Motors may be served through its registered agent, to-wit: Neal Chrisman, 1606 Church Street, Decatur, DeKalb County, Georgia 30030.

Appendix A

13.

Defendant Chris Motors is subject to both the jurisdiction and venue of this Court.

FACTUAL ALLEGATIONS

14.

On or about May 13, 1992, at approximately 9:05 a.m., Plaintiff was operating a 1991 BMW 535i model automobile in a southerly direction on Briarcliff Road, at or near its intersection with Sheffield Drive, in the City of Atlanta, DeKalb County, Georgia.

15.

At said time and place, James Scott (hereinafter referred to as "Scott") was operating a 1984 Dodge Ram 350 vehicle, also in a southerly direction on Briarcliff Road, in the City of Atlanta, DeKalb County, Georgia.

16.

At said time and place, Plaintiff Dagi was traveling at a safe and reasonable distance behind Scott's vehicle.

17.

At said time and place, Scott was stopped at the intersection of Briarcliff and Sheffield Drive, attempting to make a left hand turn onto Sheffield Drive, when Plaintiff attempted to safely brake her BMW automobile with sufficient distance between

her vehicle and Scott's vehicle to allow her to stop, under the speed and conditions existing at the time, but her vehicle would not decelerate or stop because of defects in the mechanical system in said vehicle, causing her vehicle to violently collide into the rear of Scott's vehicle.

18.

As a direct and proximate result of said collision, caused by the mechanical defects in Plaintiff's BMW automobile, Plaintiff's BMW sustained extensive damage.

19.

On or about April 2, 1992, Plaintiff purchased said 1991 BMW automobile from Defendant Chris Motors.

20.

Defendant Chris Motors represented, attested and certified to Plaintiff via an Odometer Disclosure Statement that there were only 5,391 miles driven on the subject BMW 535i automobile at the time she purchased said vehicle.

21.

The Odometer Disclosure Statement certifying that there were only 5,391 miles on said BMW 535i automobile was signed and executed by E. W. Sweeney, III, the Sales Manager for Defendant Chris Motors.

Appendix A

22.

The VIN number for the subject BMW 535i automobile is WBAHD1315MBF11537.

23.

The purchase price for the subject BMW 535i automobile was approximately $38,022.14.

24.

From the time that Plaintiff purchased the subject BMW 535i automobile until the time of the subject May 13, 1992 incident, Plaintiff did not in any way change, alter or modify the subject BMW automobile.

COUNT I
STRICT LIABILITY
(BMW)

25.

The allegations in Paragraphs 1 through 24 of Plaintiff's Third Amended Complaint are hereby incorporated by reference and made a part hereof as if each such allegation was fully set forth herein.

26.

The subject BMW 535 automobile purchased by Plaintiff Linda Dagi from Defendant Chris Motors was originally designed and manufactured by Defendant BMW in a defective

condition unreasonably dangerous to the users and consumers of same which included Plaintiff Linda Dagi.

27.

The subject BMW 535i automobile was defective at the time it was placed into the stream of commerce by Defendant BMW and sold to the Plaintiff and said BMW automobile was not changed, altered or modified in any way by Plaintiff at the time of the subject May 13, 1992 incident.

28.

The subject BMW 535i automobile was defective at the time of the subject May 13, 1992 incident.

29.

As a direct and proximate result of the defective condition of the subject BMW 535i automobile, Plaintiff was involved in said collision causing her vehicle to sustain extensive damage.

30.

The subject BMW 535i model automobile was also defective in that the odometer of said vehicle could be disengaged by merely pulling the fuse which controls the odometer and instrument cluster.

31.

The defective design of the odometer and fuse circuitry of the subject BMW 535i model automobile precludes purchasers

of said model vehicles (such as Plaintiff Linda Dagi) from accurately knowing and relying upon the automobile's odometer mileage reading.

32.

By reason of the foregoing, Plaintiff Dagi is entitled to recover from Defendant BMW damages in such an amount as may be shown by the evidence and determined by the jury in their enlightened conscience.

COUNT II
STRICT LIABILITY
(BMW OF NORTH AMERICA)

33.

The allegations in Paragraphs 1 through 32 of Plaintiff's Third Amended Complaint are hereby incorporated by reference as made a part hereof as of each such allegation was fully set forth herein.

34.

The subject BMW 535i automobile purchased by Plaintiff from Defendant Chris Motors was originally designed and manufactured by Defendant BMW in a defective condition to the users and consumers of same, which included Plaintiff Dagi.

35.

The subject BMW 535i automobile was defective at the time it was placed into the stream of commerce by Defendant BMW

and sold to the Plaintiff and said BMW automobile was not changed, altered or modified in any way by Plaintiff at the time of the subject May 13, 1992 incident.

36.

The subject BMW 535i automobile was defective at the time of the subject May 13, 1992 incident.

37.

Defendant BMW of North America failed to disclose or otherwise warn Plaintiff Linda A. Dagi of the defects in the subject BMW 535i automobile.

38.

As a direct and proximate result of the defective condition of the subject BMW 535i automobile, Plaintiff was involved in said collision causing her vehicle to sustain extensive damage.

39.

By reason of the foregoing, Plaintiff Dagi is entitled to recover from Defendant BMW damages in such an amount as may be shown by the evidence and determined by the jury in their enlightened conscience.

Appendix A

COUNT III
NEGLIGENCE
(CHRIS MOTORS)

40.

The allegations in Paragraphs 1 – 39 of Plaintiff's Third Amended Complaint are hereby incorporated by reference and made a part hereof, as if each such allegation was fully set forth herein.

41.

Defendant Chris Motors sells BMW products, and specifically, 535i model automobiles throughout the State of Georgia and holds out to the public that said automobiles it sells are safe, are of merchantable quality and are fit for the use and purposes intended.

42.

Defendant Chris Motors' negligence, which constituted the direct and proximate cause of the subject incident described hereinabove, resulting in the damages claimed by Plaintiff, consisted of, among other things:

a) Failing to exercise reasonable care in the inspection and testing of said BMW 535i automobile for mechanical defects;

b) Distributing and selling said BMW 535i vehicle to the public, knowing or should have knowing that said automobile was not reasonably and adequately safe for usage by the public on the roads and highways;

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c) Failing to warn purchasers of said automobile, and specifically, Plaintiff Dagi of the automobile's dangerous condition and failing to warn Plaintiff Dagi that said automobile was not reasonably and adequately safe for usage by the public on the roads and highways; and

d) Failing to exercise reasonable care in the maintenance of said BMW 535i automobile.

43.

As a direct and proximate result of Defendant Chris Motors' negligence, Plaintiff was involved in said collision causing her vehicle to sustain extensive damage.

44.

By reason of the foregoing, Plaintiff Dagi is entitled to recover from Defendant Chris Motors damages in such an amount as may be shown by the evidence and determined by the jury in their enlightened conscience.

COUNT IV
FRAUD
(CHRIS MOTORS)

45.

The allegations in Paragraphs 1 – 44 of Plaintiff's Third Amended Complaint are hereby incorporated by reference and made a part hereof, as if each such allegation was fully set forth herein.

Appendix A

46.

Defendant Chris Motors represented and certified to Plaintiff Dagi that the subject BMW 535i automobile had been driven only 5,391 miles via an Odometer Disclosure Statement.

47.

At the time in which Defendant Chris Motors represented and certified to Plaintiff Dagi that the subject BMW 535i automobile had only 5,391 miles through said Odometer Disclosure Statement, Defendant Chris Motors knew that such representation to Plaintiff Dagi as to the mileage of said vehicle was false.

48.

Defendant Chris Motors made such representation regarding the mileage of said BMW 535i vehicle with the intention and purpose of deceiving Plaintiff Dagi.

49.

Plaintiff Dagi reasonably relied upon Defendant Chris Motors' representation and certification as to the mileage of the subject BMW 535i automobile.

50.

As a result of Defendant Chris Motors fraudulent representation with respect to the mileage of the subject BMW 535i automobile, Plaintiff Dagi sustained damages.

51.

By reason of the foregoing, Plaintiff Dagi is entitled to recover from Defendant Chris Motors punitive damages in such an amount as may be shown by the evidence and determined by the jury in their enlightened conscience.

COUNT V
VIOLATION OF THE FEDERAL ODOMETER FRAUD ACT, 15 USC § 1981 – § 1988
(CHRIS MOTORS)

52.

The allegations in Paragraphs 1 - 51 of Plaintiff's Third Amended Complaint are hereby incorporated by reference and made a part hereof, as if each such allegation was fully set forth herein.

53.

Defendant Chris Motors tampered, disconnected, reset or altered or caused to be tampered, disconnected, reset or altered the odometer of the subject 1991 BMW 535i vehicle purchased by Plaintiff Linda Dagi.

54.

Defendant Chris Motors' actions and conduct as alleged hereinabove were in violation of the provisions of the Federal Odometer Fraud Act, 15 USCA § 1981 to 1988.

Appendix A

55.

As a result of Defendant Chris Motors' actions and conduct in violating the provisions of the Federal Odometer Fraud Act, Plaintiff Linda Dagi sustained damages.

56.

By reason of the foregoing, Plaintiff Linda Dagi is entitled to recover from Defendant Chris Motors treble damages, attorney's fees and costs, in such an amount as may be shown by the evidence and determined by the jury in their enlightened conscience.

WHEREFORE, Plaintiff Linda Dagi prays and respectfully demands verdict and judgment as follows:

a) That summons and process issue and that each Defendant be served with a copy of this Complaint as required by law and that each Defendant be required to appear and answer;

b) That Plaintiff be awarded damages from the Defendants, jointly and severally, for the destruction of Plaintiff's BMW 535i automobile, in such an amount as may be shown by the evidence and determined in the enlightened conscience of the jury;

c) That Plaintiff be awarded treble damages, attorney's fees and costs against Defendant Chris Motors, for their violation of the Federal Odometer Fraud Act, in such an amount as may be shown by the evidence and as may be determined in the enlightened conscience of the jury;

d) That Plaintiff be awarded punitive damages against

Defendant Chris Motors, in such an amount as may be shown by the evidence and as may be determined in the enlightened conscience of the jury in order to deter said Defendant from engaging in similar misconduct in the future;

e) That Defendants be charged with all court costs attributable to this action and such other costs reasonably incurred in the prosecution and trial of this case;

f) That Plaintiff be granted a *trial by jury*; and

g) That Plaintiff be granted such other and further relief as may be shown by the evidence and authorized by law.

SMOLAR, ROSEMAN, BRANTLEY
& SEIFTER

s/ Yehuda Smolar
YEHUDA SMOLAR
Ga. State Bar No. 665150

s/ James I. Seifter
JAMES I. SEIFTER
Ga. State Bar No. 636584

Attorneys for Plaintiff
Linda Dagi

101 Marietta Tower
Suite 3410
Atlanta, Georgia 30303
(404) 525-3900

Appendix A

CERTIFICATE OF SERVICE

I hereby certify that I have this day served opposing counsel with a copy of the within and foregoing **THIRD AMENDED COMPLAINT FOR DAMAGES** by depositing a copy of same in the United States Mail with sufficient postage thereon to insure delivery, addressed as follows:

Ben L. Weinberg, Jr., Esquire
Charles K. Reed, Esquire
LONG, WEINBERG, ANSLEY
& WHEELER
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309

Charles A. Wiley, Jr., Esquire
Brian H. Alligood, Esquire
FAIN, MAJOR & WILEY, P.C.
Suite 300 Hurt Building
Atlanta, Georgia 30303

This 18th day of July, 1994.

s/ James I. Seifter
JAMES I. SEIFTER

Attorney for Plaintiff
Linda Dagi